88-1487 (1)

Case No.

Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED ~~STATES~~

October Term, 1988

Glen Rogers,
Petitioner,

v.

First National Bank of Peoria, et al.,
Respondents.

Petition for Writ of Certiorari of Glen Rogers
Defendant-Appellant, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

James P. Kellstedt
Counsel of Record
1225 East Duryea Avenue
Peoria Heights, Illinois 61614
(309) 688-9093

58 pp

Was Petitioner treated unfairly in hearings before a bankruptcy Judge; did he have his day in Court?

The questions raise issues of procedural "due process", "substantial rights", and "plain error" in civil proceedings.

They relate to happenings in an adversary proceeding in bankruptcy; facts of the hearing Judge branding Petitioner a liar, mistaking that he did not have a proper pleadings response on which to proceed, refusing to hear his counsel in argument and to allow presentation of and to give consideration to his claim -- in a setting of judicial abrasion, arrogance and intimidation.

List of Parties

A list of all parties appears on the cover caption of the Seventh Circuit Court of Appeals Case (see separate Appendix p. 1A); the parties in

controversy before the Court are as stated on page 1.

Table of Contents

	Page
Questions for Review	1
List of Parties	2
Table of Contents	3
Table of Authorities	4
Citation References Lower Courts' Opinions	10
Jurisdiction of this Court.....	10
Jurisdiction in the Federal Courts Below.....	11
Constitutional and Statutory Provisions.....	12
Statement of the Case	13
Argument	
A. Procedural Due Process...	23
B. Plain Error Doctrine.....	31

C. How Far must an Advocate go to Challenge a Judge?... 36

D. Substantial Rights (Rule 61)..... 41

E. Cumulative Effect.....44

F. Argument Summary and Rule 17 Reasons for Allowing the Writ.....47

Conclusion 50

Index to Appendix (See separate covered booklet for Appendix).....51

(See Index to Appendix Page A)

Table of Authorities

Cases

Agee v. Lofton, 287 Fed. 2nd 709, 710 (8th Cir. 1961).33, 34, 40

Beck v. Wings Field, Inc., 622 F2d 114, 117 (1981).....44

Blier v. U.S. Lines, Co. C.A.N.Y. 1961, 286 F2d 920, Cert. denied, 368 U.S. 836..

Champeau v. Fruehauf Corp., 814 Fed. 2nd 1271, 1276 (8th Cir. 1987).....35

Chapman v. State of Cal. (1967), 386 U.S. 18 178L Ed. 2d 705, 87.S.Ct. 824, rehearing denied 386 U.S. 987....30

City of Chicago v. Cohen 326 Ill.372, 374-375, 158N.E. 118....24

Cleveland Bd. of Ed. v.
Laudermill (1985), 470
U.S. 532, 546; 105 S. Ct.
1487, 1495-1496.....24
Conway v. Chemical Leaman Tank
L. Inc., C.A. Tex. 1976, 525 F
2d 927, rehearing 540F 2d 837....44
Coolidge v. New Hampshire
(1971),403 U.S. 443, 449.....23
Cromling vs. Pittsburgh R. Co.,
C.A. Pa 1963, 327 F 2d 142.....42
Dartez v. Fibreboard Corp.
(1985) 765 F.2d 456, 471,
473, 5th cir.....24
Ganger v. Peyton, C.A. Va.
1967, 379 F. 2d 709.....30
Giddy v. Williams, 336 III.
482, 169 N.E. 514.....37
Hamm v. Members of Bd. of
Regents of State of Fla.,
708 F.2D 647.....34
Henry v. Williams, D.C. Mass
(1969) 299F. Supp. 36.....30
In Re Murchison (1955) 349
U.S. 133, 134.....24
Jordan v. Medley, 711 F2d 211
(1983).....43
McCandless v. United States
of America, 298 U.S. 342-348,
80L. Ed. 1205, 1208-1209.....42
Margoles v. Johns, 660F, 2d
291, 296, (7th Cir., 1981).....23
Miley v. Delta Marine Drilling
Co. 473 F.2d 856, 857-858
(5th Cir.), cert. denied,
414 U.S. 871 (1973).....40
Montana Co. v. St. Louis
M & M Co., 152 U.S. 171.....48
Murphree v. Raybestos - M Inc.
(1982) 696 F. 2d 459, 464,
6th Cir..... 24
Newman v. Staley Mfg. Co.
648 Fed. 2d 330, 334-336
5th Cir. (1981).....32,40,42,46

Nimrod v. Sylvester, C.A. Mass
1966, 369 F.2d 870.....35
Nordman v. Nate Hotel Co., 425
F.2d 1103, 1109, 5th cir. (1970).24
Ramsey v. Travelers Insurance
Co., C.A. S. Car. 1963,
317 F.2d 300.....35
Smith v. Georgia-Pacific et al.,
Appeal of James P. Kellstedt,
76 III. App. 3d 677, 395.....38
U.S. v. Sciuto, 531 F. 2nd
842, 845 7th Cir. (1976).....23
U.S. v. Singer (1983) 710 F.2d
431, 436-438, 8th Cir.....24
U.S. v. McClain, 823 F.2d 1457,
1462, 1468 (11th Cir.
1987).....46
White v. Cohen, 635 F.2d 671
(1981).....43
William v. Great Southern Lumber
Co., 277, U.S. 19, 48S Ct. 417
and 722.Ed., 761.....44
Constitution:
U.S. Constitution,
Amendment V.....12
Statutes and Rules:
28 U.S.C. (Rules Volume)
Rule 61.....12-13,41
Miscellaneous
American Constitutional Law by
Tribe, Foundation Press.....24,25
Bible, New Testament, Book of
St. John Ch. 7, Verse 51
pp. 500-513.....1,23

Citation References To Lower Court Opinions

The opinion of the Seventh Circuit Court of Appeals entered July 7, 1988, case no. 87-1727 is officially reported at 851 F.2d 916.

The opinion of the District Court entered March 31, 1987, case no. 86-3021 is officially reported at 72B.R.280.

The opinion of the Bankruptcy Court Central District of Illinois, Peoria Division, entered February 6, 1985, case no. 84-0167, by Judge Lipkin is unreported.

Jurisdiction of this Court

Jurisdiction of this Court is invoked pursuant to 28 U.C.S #2101 and Supreme Court Rule 20,2 and extension of time in this case A-472 ordered by Justice Stevens December 13, 1988 to January

11, 1989 to file a Petition for a writ of certiorari to review:

1. Judgment of the Seventh Circuit Court of Appeals, entered July 7, 1988 and following an extension of time;

2. Order of the Seventh Circuit Court of Appeals, entered September 13, 1988, denying a petition for rehearing and suggestion for rehearing in banc filed August 16, 1988.

Jurisdiction in the Federal Courts Below

The United States Bankruptcy Court, Central District of Illinois, was the federal court of first instance and had jurisdiction pursuant to the Bankruptcy Code 28 U.S.C. #157 (b)(2), to conduct the adversary proceedings of this case

according to District Court Judge Mills in his opinion 3/31/87, pp. 4-7.

The United States District Court, Central District of Illinois, had jurisdiction of the appeal from the Bankruptcy Court based upon 28 U.S.C. #158.

The United States Court of Appeals for the Seventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. #1291.

Constitutional and Statutory Provisions

CONSTITUTION OF THE UNITED STATES

Bill of Rights

Amendment V

No person shall be... deprived of life, liberty, or property, without due process of law...

FEDERAL RULES OF CIVIL PROCEDURE

28 U.S.C. (Rules Volume) Rule 61

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Statement of the Case

This case relates to an appeal of an adversary proceeding in bankruptcy, which questions the decision by the bankruptcy judge, particularly the conduct of

the proceedings in reaching that decision. The judgment of the bankruptcy court was affirmed by the district court and by the Seventh Circuit Court of Appeals.

The primary issue of procedural due process to insure a fair trial relates to two hearings by the Bankruptcy Judge in an adversary proceeding instituted by the Respondent Bank.

At the first, August 20, 1984, the Judge referred to Petitioner as, "I know Mr. Rogers... and I don't believe anything he says." (Appendix 73A) He characterized Petitioner a liar without any reason for the outburst. He was not testifying; his attorney was attempting to make a point of argument.

The transcript of that hearing also shows the Judge goading attorneys, putting a time clock on the proceedings and refusing to hear arguments on pending motions having "made up his mind."

This injudicious conduct became exacerbated at the second hearing February 4, 1986, as that transcript discloses: (Vol. IR. Doc. 38), example (Appendix 77A-78A):

> Mr. Kellstedt: On behalf of Mr. Rogers who has, as Mr. Muller testified to today, an interest in the property and the proceeds and in that check since 1976 --
> The Court: He has no interest anymore because Mr. Radley's client got the money. You are out of order.
> Mr. Kellstedt: We are not out of order. We are a party to this lawsuit.
> The Court: I am not going to listen to you any more.
> Mr. Kellstedt: You have not considered the case of the claim of Mr. Rogers at all in this case.
> The Court: You didn't file the proper response.
> Mr. Kellstedt: I filed them. They are in the court records.
> The Court: I am not going to argue with you.
> Mr. Kellstedt: I wish to call it to your attention that you never considered fairly and fully Mr. Rogers' - The Court: I am not going to hear any more in this case.

There is nothing in the record except inference to support the statement of the Seventh Circuit Court of Appeals (pp. 4, 6 Opinion) that Rogers was not present at the February 4, 1985 hearing, and he did not testify, as the Judge made it clear that he would hear no more. The record except by inference does not read as the Court in its Opinion says (pp. 4, 6 Opinion), that Rogers' attorney was not present at the beginning and appeared later after the Bank had presented its judgment and lien evidence. The transcript heading (Appendix 75A, 76A) displays: "The hearing commenced at 1:30 p.m.... appearances:... Attorney James P. Kellstedt... on behalf of Glen Rogers."

The controversy which the Bankruptcy Judge arbitrarily terminated involved claims about a farm real estate transaction and rights to a check of $126,539.00 on which the Bank claimed a prior lien to

the extent of the Bankrupt Muller's interest. Petitioner claimed and the Bankrupt testified to a partnership interest in the land which "allegedly" was sold, the ownership of which had been in litigation in a state court for several years, the case pending for trial at the time of the bankruptcy. Also, if a sale was found, Petitioner asserted a half interest in the proceeds of the check, which the Bankrupt had held uncashed over a long period of time dependent on the outcome of the state court lawsuit. The Bank filed the adversary proceeding naming Petitioner and others Defendant who may have had claims against the check. Also the Bank had started a separate state court case on the check which was stayed by that Judge when the bankruptcy case commenced.

Petitioner says the history of misconduct of the Bankruptcy Judge which had

been criticized by lawyers, the press (Appendix 79A-93A) and ultimately by the Seventh Circuit Court of Appeals by its order of suspension (Appendix 94A) pending investigation followed by the next day resignation of the Judge, (Appeals Court Opinion p.7.), buttresses his position of violation of procedural due process and substantial rights, arising out of the incidents before and after referenced, examined both singly or in aggregate, based upon both his objections or "plain error" in a civil proceeding.

1. Judge Lipkin said Rogers could not be believed (1st hearing transcript p. 9);
2. Judge Lipkin mistook the pleadings situation and said that Rogers wasn't properly before the Court because he hadn't filed necessary pleadings (Appendix 77A). Rogers filed an Answer, Affirmative Defense and Counter-

claim and also a Motion to Dismiss (Record Vol.I. Doc. Nos. 10 and 11 filed July 23, 1984). It was the Bank which filed no pleading response in disregard of Rules 7(a), 8(d) and 12 of Federal Rules of Civil Procedure that there shall be a reply to a counter-claim.

3. There were seven parties and/or their attorneys in a hearing which had been scheduled for an hour, an impossible time scheduling approach in view of the nature of the issues, the number of parties and the supposed right to be heard and present evidence. And Judge Mills indicated that the Judge may have "gone too far in trying to hurry the proceeding along" (p. 15 of his Opinion);

4. Rogers' attorney was not heard, and the Judge denied him opportunity to fairly and fully present Rogers' case (2nd hearing transcript pp. 49-54);

5. The Court did not even offer to hear or request final or summary argument at the complicated second hearing before his hasty oral ruling and then wouldn't hear anymore (2nd hearing transcript pp. 49-54);
6. Notice of second hearing did not designate trial, there were no pre-trial conferences, no proper waiver of and no jury trial as had been requested; the state court case issues were ignored (Vol.I.R., Doc.26 and record and transcripts);
7. At the two hearings, the Judge badgered the attorneys and the witnesses (see both hearing transcripts and second hearing transcript Tpp. 27-28, 43, 49-53);
8. At the two hearings of the case, Judge Lipkin asked for, was guided by and placed special reliance on the wisdom and requested recommendations of the

attorney for the Bank, to the exclusion in most instances of the other attorneys and parties (1st transcript August 20, 1984 hearing, RI Doc. 17, pp.6-11), and 2nd transcript February 4, 1985 hearing, RI Doc. 38, pp. 9, 50-52).

The Opinion of the Circuit Court of Appeals concedes that the trial at the bankruptcy level "was not a model proceeding and left much to be desired", (p. 7 Opinion). The Court referring to the Judge's "well-known record of abrasive and unfair treatment of attorneys" (p.7 of Opinion), says "that such a state of affairs did exist and was most unfortunate," and points out that when the Circuit Council of the Court addressed the issue and ordered a suspension, Judge Lipkin promptly resigned. The Court admits that the bankruptcy trial "was difficult for all concerned and it regretted the necessity of lawyers

having to practice in an unpleasant and difficult atmosphere," such as that which existed in Judge Lipkin's Court (p.9 of Opinion.)

Likewise, the District Court Judge in his opinion (p.p. 15,16) condemned the conduct of the Bankruptcy Judge, saying that both the hearings were in a manner that he "in no way condones," and opinion (p.11), that the due process rights of Petitioner to a fair trial against the Bankruptcy Judge's comments and conduct raised "a troublesome issue in this Appeal," and opinion (p.p. 14,15) that the Judge's remarks of Rogers during the first motion hearing and his comments and treatment of Rogers and the attorneys during the final hearing "were indeed regrettable and unworthy of praise," and "the judge may have gone too far in trying to hurry the proceeding along."

Argument

"Doth our law judge any man, before it hear him, and know what he doeth?" (Bible, New Testament, Book of St. John Ch.7, Verse 51.)

ARGUMENT A - PROCEDURAL DUE PROCESS

That's what the Bankruptcy Judge did to petitioner; he judged before and without hearing him and knowing.

The litigant was denied due process; he was "in fact treated unfairly". (Margoles v. Johns, 660 F. 2d 291, 296, (7th cir., (1981))

Missing essentials of due process include:

1. A neutral and detached magistrate; (U.S. v. Sciuto, 531 F. 2nd 842, 845 7th cir. (1976)); Coolidge v. New

Hampshire (1971), 403 N.S. 443, 449; In Re Murchison (1955) 349 U.S. 133, 134; Dartez v. Fibreboard Corp. (1985) 765 F.2d 456, 471, 473, 5th cir.);

2. An atmosphere of impartiality, without the fatal appearance of unfairness, bias, or prejudice; (American Constitutional Law by Tribe, Foundation Press, pgs 500-513, particularly 503, 508, 512, Nordmann v. Nate Hotel Co., 425 F. 2d 1103, 1109, 5th cir. (1970); U.S. v. Singer (1983) 710 F. 2d 431, 436-438, 8th cir; Murphree v. Raybestos - M Inc. (1982) 696 F. 2d 459, 464, 6th cir.;
3. An orderly proceeding; (City of Chicago v. Cohen) 326 Ill. 372, 374-375, 158N.E.118)
4. "The opportunity to defend ones self and to present reasons... why a proposed action is unwarranted: (Cleveland Bd. of Ed. v. Laudermill (1985),

470U.S. 532, 546; 105 S.Ct. 1487, 1495-1496; (American Constitutional Law by Tribe, Foundation Press, p.p. 500-513, particularly 503, 508, 512.).

As stated in the Petition for Rehearing before the Seventh Ciruit Court:

The Record indicates the Judge accelerated the time procedure of the February 4, 1985 hearing in his irritation of any potential trial interruptions. He constantly referred to other people and their attorneys waiting to go with their cases, which he apparently had scheduled for 2:30 p.m., less than an hour after the hearing in question was commenced. He talked about getting on with it and badgered attorneys and witnesses.

Rogers' attorney had no thought that the Judge was going to enter a final order without normal approaches to the other parties and each of their attorneys on whether they had any evidence or any

points to raise or any arguments to make, when he suddenly said, like in one breath and no time break between question and ruling,

> "What else is there, gentlemen? I think under the evidence Mr. Radley has a valid lien on this check. I want Mr. Radley to prepare an order to that effect". (2nd hearing transcript, Doc. 38, T50)

He did not announce or clarify as he should have, the extent of the lien or that it extended only to Muller's interest in the check or that Rogers' interest in the check still was to be determined.

The Judge said the above quotation after he had just admonished the attorney for Rices and hinted he didn't need to hear more testimony while Rice, no questions having been asked of him, was still in the witness chair (T 49-50). The Judge didn't ask the question individually of each attorney or party who had

not yet offered evidence or testified or give anyone time to answer before ruling. He had asked the Bank's attorney to "put on a witness" (T 9), allowed the Rices' attorney to call witnesses (T 24, 28, 43), and then badgered their attorney Church when he called Rice to the stand (T 49-50). The Judge did not ask the attorney for the Trustee, the attorney for Mullers - the bankruptcy petitioners, or the attorney for Rogers if they then wanted to present evidence.

The Judge offered no one the right or opportunity to summarize or give final argument.

The Judge refused to hear Rogers' attorney who addressed the Court:

> "On behalf of Mr. Rogers who has, as Mr. Muller testified today, an interest in the property and the proceeds and in that check, since 1976 --"

instead interrupting and breaking in with:

> "You are out of order. I am not going to listen to you anymore." (T 53)

Upon being told he hadn't considered the claim of Rogers at all, the Judge replied:

> "You didn't file the proper response." (T 53)

Rogers' pleadings, a motion, answer, affirmative defense and counter-claim, as we have stated before, had been timely filed and were in the Court file (see RI Docs. 10, 11), to which, in fact, the Bank had not filed a responsive pleading. The Court shut off all further objection and communication, emphatically interrupting the attorney:

> "I am not going to argue with you. I am not going to hear anymore in this case." (T 53)

The bankruptcy Judge's brusque refusal to hear further, coupled with his prejudice against Rogers, undoubtedly affected the outcome and denied due process. The district court recognized that more than one permissible inference was contained in the facts adduced at the abbreviated hearing. Indeed, the bankruptcy Court had a curious set of circumstances before it, namely: (1) a real estate sale in which a warranty deed is issued over two years prior to payment of the sale price: (2) a check for 126,539 issued to people in obvious financial straits who had refused to cash the check for over four years; (3) a real estate transaction and purported silent partnership which was the subject of a state court action which had been pending over three years at the time of the hearing. The bankruptcy judge made no attempt to fully educate himself regarding the

interplay of these curious circumstances.

The Judge, thus, foreclosed Rogers without direct evidence of his claim and a fair hearing.

Before the claimed procedural due process errors can be held harmless, the reviewing court must be able to believe that they were harmless beyond a reasonable doubt. (Chapman v. State of Cal, (1967), 386 N.S.18, 17L.Ed 2d 705, 87,S. Ct. 824, rehearing denied 386.U.S. 987; also Henry v. Williams, D.C. Mass (1969) 299F. Supp. 36; Ganger v. Peyton, C.A. Va. 1967, 379F. 2d 709.) Neither the District nor the Circuit Court seem to have considered or applied this test which leads to a different result.

ARGUMENT B - PLAIN ERROR DOCTRINE

The Seventh Circuit should recognize and apply the plain error standard to civil proceedings and should have to this case.

The Appeals Court said in its Opinion, p. 6:

> "It is dubious whether this Circuit recognizes plain error in a civil proceeding".

Although the Appeals Court went on, Opinion, p. 6:

> "If invocable at all, 'only in most exceptional circumstances we will allow a civil appellant to make a nonjurisdictional argument for the first time on appeal...Walker v. Maccabes Mutual Life Insurance Co., 753F. 2d 599, 602 (7th cir. 1985). We are not persuaded that this case, represents an exceptional circumstance."

Other Circuit Courts of Appeal have recognized the doctrine and have applied it. It has been invoked in cases where the circumstances are not as exceptional

or no more exceptional than petitioner's case.

In Newman v. Staley Mfg. Co., 648 Fed. 2d 330, 334-336 5th Cir. (1981), the Court using the plain error standard in part reversed for prejudicial remarks of a Judge which favored one party. The Court said, p. 355:

> "When a timely objection was made at trial, we will inquire whether a remark impaired a substantial right of the objecting party. Fed. r. Civ. Pr. 61. When a timely objection was not made at trial, however, appellate review is not precluded. 'Where a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial, the absence of objections will not preclude our review since counsel will be loathe to challenge the propriety of a trial judge's utterances for fear of antagonizing him and thereby prejudicing a client's case.' Miley v. Delta Marine Drilling Co., 473 F. 2d 856, 857-58 (5th Cir.), cert denied, 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1973). Although not precluded, appellate review is limited to review

> for plain error. E.g., Morreale v. Downing, 630 F.2d 286 (5th Cir. 1980). At trial Staley timely objected to some of the allegedly improper comments of the trial judge; we will accordingly review these remarks to ascertain whether they affected a substantial right. Staley did not object to other allegedly improper statements, and our review of these statements is limited to our review for plain error. Of courseeven though our review of the individual remarks will be governed by two standards, in evaluating the effect of the comments we must consider the record as a whole."

The courts recognize in situations of no objections, that counsel may be reluctant or frustrated to question a trial judge's remarks or conduct for fear of antagonizing him or prejudicing the client's case (Agee v. Lofton, 287 Fed. 2nd 709, 710 (8th Cir. 1961); Champeau v. Fruehauf Corp., 814 Fed. 2nd 1271, 1276 (8th Cir. 1987). The "plain error" approach resulted in reversal of the

trial judge for "unfortunate remarks" in the Agee case, the Court saying, p. 710:

> "Exceptions should, no doubt, have been taken at the trial to the objectionable remarks of the judge; but counsel, in a trial such as this, are, understandably, loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case. This Court, regardless of the absence of objections or exceptions, may notice plain error, and is under obligation to see that trials in the district courts are conducted impartially and that they are not without some measure of dignity and decorum."

As the Court said, p. 651, in Hamm v. Members of Bd. of Regents of State of Fla., 708 F.2d 647 (1th Cir. Court of Appeals 1983), where Plaintiff failed to invoke the recusal or disqualification statutes, but the Court reviewed on the plain error standard.

> "The Plaintiff in this case invoked neither statute in the district court so that the plain error standard of

> review applies here. Cf. United States v. Schreiber, 599 F.2d 534, 535 (3rd Cir.), cert. denied, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979).

There the Court held, after revieww of the issue on the merits, that the Judge;s conduct did not constitute "pervasive bias" necessary to reverse. The Court did not use technical or procedural gounds not to review, but reviewed on the merits, even if ultimately holding against the appellant.

A reviewing court may recognize plain and prejudicial or harmful or fundamental error of its own volition. (Ramsey v. Travelers Insurance Co., C.A. S.Car. 1963, 317 F.2d 300; also see Nimrod v. Sylvester, C.A. Mass 1966, 369 F 2d 870; Blier v. U.S. Lines Co, C.A. N.Y. 1961, 286 F2d 920, cert. denied, 368 U.S. 836.)

ARGUMENT C - HOW FAR MUST AN ADVOCATE GO TO CHALLENGE A JUDGE!

An advocate must be allowed reasonable discretion to determine the extent of challenge and objection to an abrasive Judge in an atmosphere of trial prejudice.

The Appeals Court indicated that Counsel has not gone far enough, saying,

> "Had Rogers' counsel done more for his client there, then we, too, might have been able to do more for him here" (p. 7 of Opinion).

At what level of exposure to prejudice should counsel advocate? Rogers' attorney, a contemporary of Judge Lipkin, knew about his health and temperament problems. A general practitioner with other clients, as well as Rogers, coming before the Court, he was frustrated.

The lawyer should not be required to perform a useless act of procedure against the mind-set of a Judge Lipkin and risk further antagonism.

Examine (Appendix 77A) and note how the Judge interrupted him, before he could finish a first sentence and yelled emphatically he wouldn't listen to him anymore. This was a no chance offer of proof situation.

An offer of proof need not be made, to protect the record, where it appears from the context of the trial and the attitude of the Judge that it would be denied. In the case at bar, the Judge wouldn't even hear the attorney (T 53).

An extremely hostile attitude on the part of the trial judge will excuse the making of an offer. (Giddy v. Williams, 336 III. 482, 169 N.E. 514).

How far must counsel go? This Appeals Court said,

- "that Judge Lipkin had a publicly well-known record of abrasive and unfair treatment of attorneys" (p. 7 of Opinion).

Rogers' attorney had faced contempt charges in advocating a client's cause. He was not timid to stand up for his client. See Smith v. Georgia-Pacific et al., Appeal of James P. Kellstedt, 76 III.App.3d 667, 395 N.E.2d 214 (1979), reversing a direct criminal contempt judgment against the attorney, the Court saying, p. 217 N.E. 2d citation:

> "Counsel was merely overzealous in the presentation of his case."

To describe Rogers' attorney's remarks as scolding the Judge after he'd made his decision does not fit (T 53)! At the time of the surprise oral ruling, without putting in his case -- no testimony, exhibits or arguments -- for Rogers, the attorney did not anticipate any decision, and after it, his attempted

remarks were purposed to move on, give Rogers his day like the Bank and Rices had. He rejects the notion that by calculated risk he took a chance, "to stand by" versus "confrontation", as a trial tactic which lead to not preserving the record. It does not square with his trial background and experience.[1]

---

[1]Roger's attorney has spent over forty years in practice as an advocate, his first three years with a Chicago law firm, before opening law offices in his hometown which he has been operating as a senior partner and individually ever since. At the age of 30 he was Public Defender of Peoria County, and at age 33 was elected State's Attorney. He also is a licensed member of the Bar of the Commonwealth of Massachusetts, after taking that bar examination in 1979 at age 61. He is experienced in all kinds of litigation, criminal, civil and tort, in various levels of trial and appellate courts and administrative agencies.

The Appeals Court in its Opinion, perchance in drollery, kindly says, footnote 1, pp. 7-8, Rogers' lawyer "demonstrated his commendable ability as a seasoned practitioner to be fully heardxxx". The attorney knew, particularly in this case with complex issues, that unless he put in evidence by and for his client, he absolutely had no chance to win.

The propriety of not making a timely objection for fear of antagonizing a Judge and prejudicing the client's case has been acknowledged in Newman v. Staley Mfg. Co., 648 F.2d 330, 334-336 (5th Cir. 1981); Champeau v. Fruehauf Corp., 814 F.2d 1271, 1975-1277 (8th Cir. 1987); Agee v. Lofton, 287 F.2d 709, 710 (8th Cir. 1962); Miley v. Delta Marine Drilling Co, 473 f.2d 856, 857-858 (5th Cir.), cert. denied, 414 U.S. 871 (1973).

ARGUMENT D - SUBSTANTIAL RIGHTS FEDERAL CIVIL PROCEDURE (RULE 61)

When a timely objection is made, the Court said in, Newman v. Staley Mfg. Co., (pp. 334-336), previously cited here in Argument B of the Petition, that we will inquire whether a trial judge's remarks or conduct impaired a substantial right of the objecting party. Timely objections of a general nature were made at the motion hearing to the Bankruptcy Judge's characterization of Petitioner as "not to be believed." The same is true about the remarks and conduct of the Judge at the second and final hearing, particularly as reflected in the transcript (Appendix 77-78A) where objection and entreaty were proffered by counsel in behalf of his "not to be believed" client. Is there any reasonable doubt that

these cumulative actions affected Rogers' substantial rights? (See Rule 61, Brief, ante ps. 12-13.)

Attacks on the deportment of a judge should be weighed carefully. And verbal acts of a hearing court where not justified to the issues or to any improper conduct of counsel constituted prejudicial error. (Cromling v. Pittsburgh R. Co., C.A. Pa 1963, 327F 2d, 142.)

The leading case of McCandless v. United States of America, 298 U.S. 342-348, 346-348, 80L. ed. 1205, 1208-1209, refers to the present Rule 61 of "substantial justice" and held that an erroneous ruling denying an offer of proof which relates to the substantial rights of a party is ground for reversal. Rogers was denied an opportunity to present any argument or any evidence or offer of proof. The Judge said that's

all I'm going to hear, that's it. In the McCandless case there was error, in denying an offer of proof. In our case there is a substantial rights error, in denying opportunity to present any proof or argument.

Other "substantial justice" cases include:

Prejudicial material may so taint a case as to require a new trial (tape impeachment that jury may not have heard). White v. Cohen, 635 F2d 671 (1981).

Wrongful admission of testimony affected defendant's substantial rights. Reversed. Jordan v. Medley, 711 F2d 211 (1983).

Gratuitous remarks by witness for plaintiff. Reversed for defendant. "The only way the the defendant can be protected against the strong possiblility of

harm from the improper occurence at trial for which it was in no way responsible is by having a new trial." Beck v. Wings Field Inc., 622 F2d 114, 117 (1981).

Also see Conway v. Chemical Leaman Tank L. Inc., C.A. Tex. 1976. 525 F 2d 927, rehearing 540 F 2d 837, judgment substantially swayed by erroneous actions as a whole, and Williams v. Great Southern Lumber Co., 277 U.S. 19, 48S Ct. 417, and 72L. Ed. 761.)

ARGUMENT E - CUMULATIVE EFFECT

The "cumulative effect" of the errors mentioned beginning with reference to characterization of Rogers as not to be believed, all the way through the processing of the case, to the point at the end of the second hearing where the Judge tells Rogers' attorney that he is not

properly before the Court on the pleadings and says that I will not hear anymore from you, show the almost straight line of bias by Judge Lipkin to Rogers and may constitute plain error.

The review courts indicate that Petitioner had waived or not preseved his grounds of claimed defects in the proceedings which it considered as separate items of error. This does not get to the jist of Rogers' position. He makes reference to all these other happenings or errors as cumulative violations of the substantial rights and plain error standards, as mixed grounds of reversal, taken in entirety. The overall over activist conduct, in cumulation, of this Judge to this party exceeds the scope of judicial ethics, any Code of Judicial Conduct, substantial justice and due process.

See U.S. v. McClain, 823 F.2d 1457, 1462, 1468 (11th Cir. 1987), though a criminal case, the case is appropos on accelerated and discourteous trial management and that the "cumulative effect of the errors xxx denied the defendants their basic right to a fair trial under the plain error doctrine".

The holding of the Appeals Court in Newman v. Staley Mfg. Co., 648 F.2d 330, 334-336 (5th Cir. 1987), fits the case at bar. The Court reversed for prejudicial remarks of a Judge which favored one party. The Court said, p.p. 335, 6, in applying the two standards of Rule 61 and plain error:

> "Of course even though our review of the individual remarks will be governed by two standards, in evaluating the effect of the comments we must consider the record as a whole."

SUMMARY ARGUMENT AND RULE 17

REASONS FOR ALLOWING THE WRIT

The issues of this case; fair treatment, the right to be heard, to produce evidence in an orderly proceeding, before a neutral judge, procedural due process, substantial justice, application of the plain error doctrine in civil proceedings, fundamentally impact the day to day administration of justice.

Equal justice for all, means to protect and preserve the rights of the citizen against arbitrary judicial action.

These principles apply to Rogers as well as against Judge Lipkin and his proceedings. The proceedings were deficient, not due process of law; technically doubting it, as the review courts' opinions reflect, plausible middling, we do not condone and would have done it

differently, cannot equate with ultimate justice. (Montana Co. v. St. Louis M & M Co., 152 U.S 171.)

The easy out -hindsight, blame the attorney (who admits he is not without blunder), but in doing so, we affirm a procedure of misconduct and bias, and justice is undone.

The lower courts by upholding and Judge Lipkin by conducting an erroneous trial have departed from the accepted and usual course of fair and due process proceedings. Albeit this is only part of a bankruptcy, an adversary proceeding, the hearing principles involved are special and important, and in their sanctioned departure there, beg supervisory reaffirmation here.

The writ of certiorari also should be granted; because this decision of the Seventh Circuit conflicts with decisions

of the other circuits such as the Fifth, Sixth, Eighth, and Eleventh, see cases cited before, on applying the plain error analysis to civil case issues, to refute the viewpoint expressed p. 6 of Opinion that:

> "It is dubious whether this circuit recognizes plain error in a civil proceeding such as the case here".

The insight of dissent of Judge Jolley, (5th cir. 1986, Reese v. Mercury M. Div. of Brunswick Coop, 793 F2d 1416, 1430-36, p. 1435) provides the right reason this Court should allow the petition:

> "I respectfully submit that if we truly believe that the federal courts are a forum where litigants may expect impartial, objective, fair and just proceedings; this case must be reversed."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

James P. Kellstedt
Counsel of Record for
Petitioner Glen Rogers,
Defendant-Appellant

Julian E. Cannell
Attorney

INDEX TO APPENDIX

A (i) Opinion of U.S. Seventh Circuit Court of Appeals, July 7, 1988.....1A-10A

A (ii) Judgment, Opinion and Order, U.S. District Court Judge Mills, March 31, 1987.....11A-49A

A (ii) Judgment Order of Bankruptcy Judge Lipkin, February 6, 1985.....50A-66A

A (iii) Judgment Order of U.S. Seventh Circuit Court of Appeals, July 7, 1985.....67A-68A

A (iii) Order Denying Petition for Rehearing U.S. Seventh Circuit Court of Appeals, September 13, 1988.....69A-70A

A (iv) Partial transcript of Proceedings, Bankruptcy Court August 20, 1984.....71A-74A

A (iv) Partial Transcript of Hearing February 4, 1985.....75A-78A

A (iv) Peoria Newspaper Article re Bankruptcy Judge Lipkin dated November 29, 1984, January 15, 1985 and July 9, 1985.....79A-93A

A (iv) Order of Suspension Bankruptcy Judge Lipkin by Acting Chief Judge Bauer U.S. Seventh Circuit Court of Appeals, June 27, 1985.....94A

88-1487

Case No.

Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

In the matter of

Glen Rogers,
Petitioner,

v.

First National Bank of Peoria, et al.,
Defendants.

Petition for Writ of Certiorari of Glen Rogers,
Defendant-Appellant, Petitioner

APPENDIX

James P. Kellstedt
Counsel of Record
1225 East Duryea Avenue
Peoria Heights, Illinois 61614
(309) 688-9093

---

96 pp

INDEX TO APPENDIX

A (i) Opinion of U.S. Seventh Circuit Court of Appeals, July 7, 1988.....1A-10A

A (ii) Judgment, Opinion and Order, U.S. District Court Judge Mills, March 31, 1987.....11A-49A

A (ii) Judgment Order of Bankruptcy Judge Lipkin, February 6, 1985.....50A-66A

A (iii) Judgment Order of U.S. Seventh Circuit Court of Appeals, July 7, 1985.....67A-68A

A (iii) Order Denying Petition for Rehearing U.S. Seventh Circuit Court of Appeals, September 13, 1988.....69A-70A

A (iv) Partial transcript of Proceedings, Bankruptcy Court August 20, 1984.....71A-74A

A (iv) Partial Transcript of Hearing February 4, 1985.....75A-78A

A (iv) Peoria Newspaper Article re Bankruptcy Judge Lipkin dated November 29, 1984, January 15, 1985 and July 9, 1985.....79A-93A

A (iv) Order of Suspension Bankruptcy Judge Lipkin by Acting Chief Judge Bauer U.S. Seventh Circuit Court of Appeals, June 27, 1985.....94A

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1727

IN THE MATTER OF:

ALVIN S. MULLER and PHYLLIS H. MULLER,

Debtors.

FIRST NATIONAL BANK OF PEORIA,
a National Banking Association,

Plaintiff-Appellee,

v.

ALVIN S. MULLER, PHYLLIS H. MULLER, GLEN ROGERS, ROBERT E. RICE, MYRTLE R. RICE; CHARLES C. COVEY, Trustee, and DANIEL M. HARROD,

Defendants-Appellants.

APPEAL OF:

GLEN ROGERS,

Defendant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 86 C 3021—**Richard Mills**, *Judge.*

ARGUED APRIL 21, 1988—DECIDED JULY 7, 1988

Before WOOD, JR. and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

WOOD, JR., *Circuit Judge*. This is the appeal of an adversary proceeding in bankruptcy, which not only questions the decision by the bankruptcy judge on the merits but particularly the conduct of the proceedings in reaching that decision. The judgment of the bankruptcy court was affirmed by the district court.

I. BACKGROUND

Involved is a disagreement among the various parties about a farm real estate transaction, and in particular, the rights of the parties to a certified check for $126,539.23, allegedly tendered as either full or partial payment for the farm.

This bankruptcy phase of the controversy was preceded by two separate state court proceedings. The first was filed in 1987 by Alvin and Phyllis Muller, initially the sole owners of the farm and the debtors here, and Glen Rogers, as plaintiffs, against defendants Robert E. Rice and Myrtle R. Rice. The plaintiffs claimed to be partners in the farm with defendants and were seeking to rescind their alleged partnership agreement and to require the Rices to return the farm to the Mullers and Rogers. Rogers was described by the Mullers as a "silent partner." It appears to have been the position of the Mullers and Rogers that they, along with the Rices, each owned an undivided one-third interest in the farm. The Rices, however, claimed to be the sole owners following the subsequent conveyance of title to them in 1977 and their tendering of the certified check to the Mullers. The Mullers claimed they had previously deeded the property to the Rices only for zoning purposes in accordance with an unwritten partnership agreement, which the Rices denied. The certified check was dated November 16, 1979, and stated on its face that it was in full settlement of the purchase price. The Mullers held the certified check without negotiating it. Rogers' name did not appear in the chain of title, and he did not join in the conveyance by the Mullers to the Rices.

In the second state proceeding in 1983 the National Bank of Peoria had obtained a personal judgment against the Mullers in the amount of $231,642.64. In its efforts to collect on the judgment the bank discovered the certified check being held by the Mullers. The bank's judgment was made a lien on the certified check, and the state court ordered the Mullers to deliver the check to the attorney for the bank.

Thereafter, on May 30, 1984, the Mullers filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The bank filed a claim as a secured creditor by virtue of its judgment lien and then filed this adversary proceeding seeking a declaration that the bank's lien on the certified check was superior to all other possible interests. Named as having or claiming to have some adverse interest in the certified check were the Mullers, the Rices, Rogers, Charles Covey, trustee, and Daniel Harrod, an attorney who claimed a lien for attorney's fees. In response, Rogers, the appellant here, claimed to be a silent partner in the farm venture and entitled to one-half of the proceeds of the certified check free of the bank's lien.

The case came on for trial before Bankruptcy Judge Max J. Lipkin, now deceased. The bank's evidence established its judgment and its enforcement procedure used to perfect its judgment lien on the certified check.

Muller, in his testimony, explained his view that the certified check, contrary to what it said on its face, was intended only to be a partial payment. Therefore he had refused to negotiate it. He explained that he had already deeded the farm to the Rices and had done so merely to accommodate contemplated zoning changes. Rogers, he explained, was his silent partner and was entitled to a share of the certified check proceeds. Muller testified further that Rogers had given the Mullers a quit claim deed of any interest he had in the farm property. Why that had allegedly been done was not explained. Nothing more is known about that alleged partnership.

Contrary to Muller's testimony, the attorney for the Rices in the real estate transaction testified that he delivered the certified check to the Mullers as full payment of the balance of the purchase price remaining after the assumption by the Rices of an outstanding mortgage on the farm. Thereafter, the Rices made payments on that mortgage.

When the bench trial began neither Rogers nor his attorney was present. The attorney did appear later and participate, but Rogers did not. Judge Lipkin ruled in favor of the bank and later signed a final judgment order containing findings of fact and conclusions of law. The certified check, it was held, belonged to the Mullers alone, but the check was subject to the perfected lien of the bank. The Mullers then, as ordered, endorsed the check to the bank.

The Mullers and Rogers appealed to the district court, which affirmed the judgment of the bankruptcy court. Only Rogers, however, appeals to this court.

II. DISCUSSION

Rogers in his brief states the basis for his appeal in these words:

> The district court erred in holding that substantial justice and due process rights of defendant Rogers were not violated by the bankruptcy judge's management and conduct of the case, including his bias and characterization of Rogers. Inadequate notice, misunderstanding of pleadings, no pretrial conference or jury trial, unreasonable hearing scheduling, accelerated hearings, discourtesy to attorneys including unreasonable time limitations and opportunity to be heard.

At a preliminary hearing August 20, 1984, Judge Lipkin expressed his view that since he had had Rogers in court once before he would not be able to believe anything Rogers might say in the present case. Rogers' attorney

objected to what he labelled the bankruptcy judge's prejudgment.

At the subsequent evidentiary trial on February 4, 1985, which resulted in the order now being appealed, this exchange took place between Judge Lipkin and Mr. James P. Kellstedt, the attorney for Rogers:

> MR. KELLSTEDT: On behalf of Mr. Rogers, who has, as Mr. Muller testified today, an interest in the property and the proceeds in that check since 1976—.
>
> THE COURT: He has no interest anymore because Mr. Radley's client got the money. You are out of order.
>
> MR. KELLSTEDT: We are not out of order. We are a party to this lawsuit.
>
> THE COURT: I am not going to listen to you anymore.
>
> MR. KELLSTEDT: You have not considered the case of the claim of Mr. Rogers at all in this case.
>
> THE COURT: You didn't file a proper response.
>
> MR. KELLSTEDT: I filed them. They are in the court records.
>
> THE COURT: I am not going to argue with you.
>
> MR. KELLSTEDT: I wish to call it to your attention that you never considered fairly and fully Mr. Rogers'—.
>
> THE COURT: I am not going to hear anymore in this case.

Rogers argues on appeal that the bankruptcy court would not listen to his argument in behalf of Rogers and prevented him from presenting Rogers' claims or introducing any evidence. He also objects that the proceeding had not been noticed as a trial and that it was hurriedly conducted without adequate opportunity for him to represent his client.

Rogers also makes a series of challenges to the bankruptcy proceeding, but as Rogers admits, he failed to raise these issues in that court. He thus has waived any challenge. *Ohio Casualty Ins. Co. v. Bazzi Constr. Co.*, 815 F.2d 1146, 1149 (7th Cir. 1987). Rogers concedes his waiver and asks only that we review the challenged issues under a plain error analysis. It is dubious whether this circuit recognizes plain error in a civil proceeding, such as the case here. If invocable at all, "[o]nly in most exceptional circumstances we will allow a civil appellant to make a nonjurisdictional argument for the first time on appeal . . . ." *Walker v. Maccabees Mut. Life Ins. Co.*, 753 F.2d 599, 602 (7th Cir. 1985). We are not persuaded that this case represents an exceptional circumstance.

The preliminary hearing at which Judge Lipkin expressed his view about Rogers' veracity was about five and one-half months before the trial. Rogers made no effort to have Judge Lipkin recuse himself because of bias. *See* 28 U.S.C.A. § 144 (West 1968); 28 U.S.C.A. § 455 (West Supp. 1988). Rogers later proceeded to trial without objection and only raised the bias issue after Judge Lipkin verbally announced his ruling unfavorable to Rogers. Any objections to the remarks of Judge Lipkin at the preliminary hearing were thereby waived.

Rogers argues that Judge Lipkin treated him unfairly during the trial. Rogers' attorney, however, failed to appear until after the bank had presented its judgment and lien evidence. Rogers himself did not appear at any time. Rogers' attorney stated Rogers' position to the court, which was that his client's claim to a share of the check should be litigated in the pending state court litigation. Thereafter, however, Rogers' attorney proceeded to interrogate witnesses, along with the other attorneys involved in the proceeding. When Judge Lipkin announced his decision unfavorable to Rogers, Rogers' counsel then objected, and the above quoted exchange occurred between them.

It appears from the record that Rogers' counsel was objecting to the holding and wanted to argue about it. He did not attempt to present any evidence, and made

no offer of proof in behalf of Rogers, although he objects now that he was prevented from introducing any evidence. It is obvious that the conduct of this trial was not a model proceeding and left much to be desired. The attorney for Rogers, however, did not attempt to develop a record at trial so as to have a factual basis for this appeal. He only offered arguments there, and here. We do not know specifically what evidence Rogers claims he was prevented from offering.

Rogers' attorney argues further that Judge Lipkin had a publicly well-known record of abrasive and unfair treatment of attorneys. That such a state of affairs did exist was most unfortunate and was later addressed by the Circuit Council of the Seventh Circuit. Judge Lipkin thereafter promptly resigned. Certainly Rogers' attorney was not surprised by Judge Lipkin's conduct. Likewise counsel for the bank conceded that he, too, was aware of possible trial problems that might arise, and therefore he avoided any confrontation with Judge Lipkin. During the trial Rogers' attorney also seems to have adopted the same nonconfrontation trial tactic, and only objected when it was announced that his client Rogers had lost. Each attorney took a calculated risk. That risk was that such tactics could mean that matters which might be objected to would not be properly preserved for appellate review. Had Rogers' counsel done more for his client there, then we, too, might have been able to do more for him here.[1]

---

[1] At oral argument Rogers' appellate lawyer, who also served as the trial attorney, demonstrated his commendable ability as a seasoned practitioner to be fully heard in behalf of his client when he was so inclined. In spite of numerous warnings from the presiding judge of the panel that his time for oral argument had already expired, counsel continued to press his arguments in behalf of Rogers. When he again quoted Judge Lipkin as saying at the end of the bankruptcy trial that he (Judge Lipkin) did not want to hear any more about the case, the presiding judge of this panel was prompted to advise Rogers' counsel that this court felt the same way, as the time allotted for oral argument had been great-

(Footnote continued on following page)

If, as Rogers argues to this court, the notice of trial was not adequate to alert him that it was a trial, then he should have revealed that concern when he appeared, but before he actively participated. It was only on appeal that the issue was raised. In any event, the notice, clearly indicating that the substantive merits of the case would be heard and decided, was sufficient.

Rogers also objects on appeal because it was a bench, not a jury trial, but he did not request a jury trial and did not object in the bankruptcy court to proceeding with the bench trial. This objection comes too late on appeal. Fed. R. Civ. P. 38(d).

Rogers also claims that his pleadings, which contained an affirmative defense and a counterclaim, should have been taken as confessed because the bank failed to respond. In his answer to the bank's complaint Rogers had denied that the bank had a first and prior lien on the certified check, and he claimed for himself a one-half interest in the check, the same as was being litigated in state court. As an affirmative defense he alleged that he, Muller, and Rice had entered into a partnership, each having a one-third interest in the farm, and that contrary to their agreement Rice was holding the farm as his own.

The bank responds that it received no notice or copy of the pleading filed by Rogers, but that in any event no response was necessary as the pleading as a whole al-

---

[1] *continued*

ly exceeded. It may appear, therefore, to Rogers' counsel that he had the same problem in this court as he did in the bankruptcy court, but there was a difference, however, as in this court it was done for a good and obvious reason and was done in a much lighter vein. We note the long-standing practice in this and other circuits of notifying, well in advance, the parties of the time they have been allotted for oral argument and strictly enforcing the announced time limits. Here the time allotted and announced was leniently, not strictly, enforced and counsel was permitted to exceed his alloted time by a substantial amount. *See* Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 55 (1987); Cir. R. 34(b)(1).

leged only an affirmative defense. *See* Fed. R. Civ. P. 5. But, as with the other issues, any alleged pleading deficiency should first have been raised by Rogers in the bankruptcy court, not on appeal.

Rogers also argues that the bankruptcy court's final order somehow exceeded the parameters of the bank's complaint. Once again no objection was raised by motion or otherwise in the bankruptcy court, but in any event we see no merit to the objection.

As difficult as the bankruptcy trial may have been for all concerned, nothing but argument, without any supporting evidence being offered in any way, was advanced in behalf of Rogers' claim. In sum, these series of challenges do not add up to the exceptional circumstance that would call for an application of any type of plain error doctrine.

Finally, Rogers challenges the bankruptcy court's finding of fact that he had no claim in the certified check. We review such findings against a clearly erroneous standard. Only if we are " 'left with the definite and firm conviction that a mistake has been committed,' " may we disturb the court's findings. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Here we cannot say that the bankruptcy court was clearly erroneous in its findings of fact. The only support for Rogers' claim to a share of the check was Muller's testimony that Rogers had an interest, but it was unexplained how that came to be. There is nothing to show that when the bank perfected its lien in the certified check it had notice of any unrecorded claim by Rogers to the real estate or to the certified check. Nothing in the state court proceeding, or otherwise, served to give Rogers any lien on the check, as far as we can tell from this record.

We regret the necessity of lawyers having to practice in an unpleasant and difficult atmosphere such as that which temporarily existed in that particular bankruptcy court, but even in such difficult circumstances the lawyers must see to the building of a reasonable and adequate

record for appeal. Mere arguments in the trial court and here, and the late raising of other objections, will not suffice.

Costs are waived.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—7-7-88—475

United States District Court

CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

IN RE:
ALVIN S. MULLER AND PHYLLIS H. MULLER

JUDGMENT IN A CIVIL CASE

THE FIRST NATIONAL BANK OF PEORIA, a National Banking Association, ALVIN S. MULLER: PHYLLIS H. MULLER; GLEN ROGERS; ROBERT E. RICE: MYRTLE R. RICE; CHARLES E. COVEY; Trustee DANIEL M. HARROD,

CASE NUMBER: 86-3021

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to Order entered by the Honorable Richard Mills, the decision of the United States Bankruptcy Court is affirmed.----------

3/31/87
Date

(S) John M. Waters
Clerk
(S) Barbara A. Wagner
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

IN RE:	)	
ALVIN S. MULLER AND PHYLLIS	)	
H. MULLER,	)	
Debtors.	)	
FIRST NATIONAL BANK OF PEORIA,	)	
a National Banking Association,	)	
Plaintiff,	)	
v.	)	No. 86-3021
ALVIN S. MULLER, PHYLLIS H.	)	
MULLER, GLEN ROGERS, ROBERT	)	
E. RICE, MYRTLE R. RICE,	)	
CHARLES C. COVEY, Trustee,	)	
and DANIEL M. HARROD,	)	
Defendants.	)	

OPINION AND ORDER

MILLS, District Judge:

This appeal from the bankruptcy court concerns the scope that court's authority to decide the interests of the parties in proceeds of a certified check issued to the debtors, but never cashed.

Before the debtors filed for bankruptcy, they had filed suit in state court to determine ownership of a farm for which the check was tendered. After they filed

bankruptcy, a creditor bank perfected a lien on the check, and filed an adversary proceeding to determine the priority of its lien. The bankruptcy court found that the check was tendered in full payment for the farm, that the debtors had accepted the check, and that the bank had a first and prior lien.

This appeal followed.

In sum: We affirm.

Background

Alvin S. Muller and Phyllis H. Muller filed a voluntary petition under Chapter 7 of the Bankruptcy Code on May 30, 1984. Charles E. Covey was appointed interim trustee. On June 21, 1984, the First National Bank of Peoria (bank) filed an adversary proceeding in bankruptcy for a declaratory judgment and mandatory injunction against Defendants Alvin and Phyllis Muller, Glen Roger, Robert E.

Rice, Myrtle R. Rice, Charles Covey, and Daniel Harrod. The bank claimed a first and prior lien upon a certified check drawn on the First National Bank in East Peoria, dated November 16, 1979, signed by Myrtle R. Rice, and payable to the Mullers in the amount of $126,539.23. In its complaint, the bank stated that each of the Defendants had--or might claim--a lien or interest to the check or proceeds.

The Rices moved to dismiss the bank's complaint, lift the automatic stay and allow pending state court litigation to continue. The pending state court litigation is the suit filed in 1980 in Tazewell County by the Mullers and Rogers against the Rices to determine ownership of property known as "Fischer Farm." Fischer Farm is the property for which the Rices had allegedly tendered the certified check in question here. The

Mullers never negotiated the check, which bore the legend, "payment in full as agreed for the sale of Fischer Farm, Groveland Township, Ill.," on its face, and terms of sale on the back.[1] In the event the bankruptcy court refused to lift the stay or dismiss the bank's complaint, the Rices alternatively requested issuance of a payment in full for Fischer Farm.

Rogers claims a one-half interest in the $126,539.23 check. The Mullers and Rogers claim there was a partnership between the Mullers, the Rices, and Rogers giving each a one-third interest in Fischer Farm. The Mullers deeded the property to the Rices, but claim they did so for zoning purposes in accordance with the partnership agreement. According to Muller, Robert Rice refused to put the terms of the "joint venture" in writing, and subsequently tendered the check.

Therefore, according to Rogers' brief, the Mullers and Rogers sought in state court to rescind the partnership agreement and return the Fischer Farm to the Mullers and Rogers. In his answer in this case, Rogers claims that the bank's interest extended only to the Mullers' one-half of the check and its proceeds.

Defendant Daniel Harrod filed pleadings claiming an attorney's lien on the check but failed to appear or offer evidence at the February 4 hearing. Attorney Harrod also filed a motion to dismiss the bank's complaint.

After a hearing on August 20, 1984, Bankruptcy Judge Max Lipkin entered an order denying pending motions, except Harrod's, which was denied at a later date. The Rices filed a motion on August 30, 1984, objecting to the bankruptcy court's jurisdiction, which

the bankruptcy court also denied. They subsequently filed an answer in which they demanded a jury trial.[2] The court conducted a hearing on the bank's complaint on February 4, 1985.[3] In its final order, the court held that in 1977 the Mullers had agreed to sell the Fischer Farm to the Rices, that the Mullers conveyed the property to the Rices, and that a disagreement subsequently developed as to the terms of the agreement.

The court found further that by signing a promissory note purporting to create an attorney's lien on the check and by holding exclusive possession of the check for more than four years[4] the Mullers had accepted and become owners of the check and its proceeds.

The bankruptcy court found insufficient evidence to prove that Glen Rogers owned the check or any part of the proceeds, and found that the Rices conveyed the check as payment

in full for the property. The court concluded that the bank had a first and prior lien on the check and its proceeds, ordering the Mullers to endorse the check over to the bank, and that title to the check and proceeds be vested in the bank. Alvin Muller and Glen Rogers appeal.

Jurisdiction

Although neither appellant directly raised the issue of the bankruptcy court's jurisdiction in this case, their objections skirt the issue. The court is therefore required to address the issue of subject matter jurisdiction sua sponte.

Muller claims that the findings of the bankruptcy court--that the Mullers owned the check and that the check was payment in full for the land--were beyond the Court's authority. Muller also attacks the Court's authority to decide a case in which a jury

demand had been made. Rogers claims that the bank could not secure a lien on property which the debtor did not accept. These contentions raise the issue of whether or not the adversary proceeding heard by the bankruptcy court is a "core" proceeding under 28 U.S.C. 157(b)(2)[5], and whether the court acted within the scope of its authority in such proceedings.

Core proceedings include most matters which are integral to the adjudication of a bankruptcy, or matters which were traditionally before the bankruptcy court. See 28 U.S.C. 157(b)(2) (Supp. 1986); Gaslight Club v. Official Creditors Committee, 46 B.R. 209 (N.D. Ill. 1985). Included among these integral functions are "determinations of the validity, extent, or priority of liens." 28 U.S.C. 157(b)(2)(k).

The adversary proceeding before the

Court in this case was invoked to determine the priority of the bank's lien. However, Muller claims that the Court erred in making findings of fact related to issues involved in the state court suit; specifically, that the Mullers owned the check and that it was payment in full for the land.

It is true that the bankruptcy court loses jurisdiction when property leaves the estate or has been sold. In the Matter of Xonics, Inc., et al., Slip op. 86-2084 (7th Cir., Feb. 27, 1987), or when the debtor or estate no longer has an interest in the property. See In re Denalco Corp., 57 B.R. 392 (N.D. Ill. 1986); In re Dr. C. Huff Co., Inc., 44 B.R. 129 (Bankr, W.D. Ky. 1984).

Still when several parties, including the debtor, claim an interest in certain property, it is within the bankruptcy court's jurisdiction to determine the interests of

all of the parties concerned. In the Matter of Xonics, Inc., et al., Slip op. at p. 7. Consider:

> Suppose A, B, and C claim interests in a pool of oil. If A is a bankrupt, the bankruptcy court could determine the interests of all three in the property under 28 U.S.C. 157(b)(2) or 157(c)(1), because only after identifying the "property" of the estate may the court apportion the property among creditors.

Id. at p. 7.

In Rainey v. International Harvester Credit Corp., 59 B.R. 987 (N.D. Ill. 1986), the Court reached a similar conclusion. The Court held that the bankruptcy court's determination of who had the superior right to two trucks was not an unlawful determination of a "non-core" issue. There, the plaintiff was the title owner of trucks sold through the debtor (Northside) to the credit corporation. He sought $40,500 that

he thought the credit corporation had paid Northside, or a determination that if the credit corporation still possessed the money, that it be held in trust and turned over to him. There, the Court said:

> Resolution of Rainey's claim by the bankruptcy court necessarily involved resolution of the issue of who, as between Rainey, Northside, and IHCC (the credit corporation), had the superior interest in the trucks. Since IHCC claimed a prior lien on the trucks, the bankruptcy court's determination of the matter fell squarely within its jurisdiction over "core" proceedings as stated in 28 U.S.C. 157(b)(2)(k).

Id. at 989.

Similarly, in the case at hand, the bankruptcy court was called upon to determine the extent of the debtor's interest in the check. This inquiry necessarily involved determining the relative rights and interests of the other parties. The fact that the court was required to adjudicate the rights

of these other parties, however, did not move the proceeding outside the court's jurisdiction. Therefore, the bankruptcy court did not exceed its authority in determining the ownership of the check and the terms of its payment.

The Evidence

Appellant Rogers disputes findings of fact and conclusions of law by the bankruptcy court on the ground that they were beyond the scope of the evidence and/or against the weight of the evidence presented at the February 4 hearing. Specifically, he disputes the court's finding that Alvin Muller exercised control over the check when he signed a note purporting to grant an attorney's lien on the check, and that by voluntarily holding exclusive possession of the check that the Mullers accepted the check. He maintains that the Mullers' filing

of the Tazewell County lawsuit shortly after they received the check controverts the finding that exclusive possession constituted acceptance. He also disputes findings that there was insufficient evidence to show that Glen Rogers owned the check or any part of the proceeds; and that the Rices have no interest in the check as it was in payment in full for the land.

In addition, Rogers disputes the Court's conclusions that Rogers did not have a lien on the check. While he agrees that a lis pendens notice allegedly filed in connection with the pending state court suit did not create a lien, he claims that the bank's lien is only contingent to the outcome of the state court litigation. Rogers also disputes the bankruptcy court's conclusion that his purported "silent partnership" with Muller was not proved by competent evidence since

there was no evidence offered to prove Rogers ever held legal or equitable title to the real estate, or had a superior right to proceeds of the sale over Mullers' creditors.

When a Court reviews a bankruptcy court's decision on appeal, the Court must adopt the bankruptcy court's findings of fact unless they are clearly erroneous. The clearly erroneous rule does not apply to review of the Court's conclusions of law, which are subject to de novo review. In re Ebbler Furniture & Appliances, Inc., 804 F.2d 87, 89 (7th Cir. 1986).[6]

At the February 4 hearing, a witness for the bank testified to the steps taken by the bank to create a lien on the check.[7] Alvin Muller, called as an adverse witness by the Rices, testified that on May 17, 1977, he had acknowledged receipt of a document from the Rices to exercise an option to purchase

Fischer Farm. Muller testified that he had received a quitclaim deed of any interest Rogers had in Fischer Farm from Rogers to the Mullers, dated September 27, 1977. In answers to a 1977 deposition read at the hearing, Muller had also said that he sold the farm to the Rices and that Rogers was to get a one-half interest in any proceeds from the property in exchange for the quitclaim deed. At the hearing, Muller testified that he signed a warranty deed for the property dated June 2, 1977, but he testified that title was conveyed for zoning purposes to Rice at Rice's request.

Muller testified that he, Rogers, and Rice had been partners, and that Rogers still had an interest in the property. He said he had received--but not cashed--the check from the Rices, and that he believed the Rices had been paying the mortgage on the farm.

Randall Jacobs, attorney for the Rices in 1979, testified that he received a letter from Muller's attorney on August 14, 1979, seeking payment on behalf of the Mullers for the farm. Jacobs testified that after a meeting between the parties at which no agreement was reached, he recommended that, since the Rices had title, they tender the money owed to the Mullers. Further, Jacobs testified that he recommended the language the Rices inscribed on the check.

Under the clearly erroneous standard of review, we do not believe the bankruptcy court's findings can be disturbed. In In re The Pearson Bros. Co., 787 F.2d 1157 (7th Cir. 1986), the Court discussed review under the clearly erroneous standard. Quoting the Supreme Court, the Seventh Circuit outlined the guiding principles:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed... Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

Id. at 1161-62, quoting Anderson v. City of Bessemer City, N.C., ---U.S.---, 105 S.Ct. 1504, 1512-13, 84 L.Ed. 2d 518 (1985) (citations omitted).

Applying those guidelines to the record in the present case, we cannot say that the bankruptcy judge was mistaken. The evidence supports the court's conclusions that the Mullers conveyed the property to the Rices in 1977, and that, as Jacobs testified, the parties subsequently disagreed as to the terms of the sale. Although Muller testified that he simply thought he was signing a note, and that he did not know there was an attorney's lien on the check, the note itself

states that it is secured by an attorney's lien which attached to the certified check. The court could reasonably conclude that by holding the check and attempting to grant a lien in its proceeds, the Mullers had accepted it.

There was no evidence offered--other than Muller's testimony--to show that Rogers was a partner or was entitled to proceeds of the check. In addition, Jacobs' testimony supported the Rices' position that the Mullers had agreed to sell the land, and supports the terms inscribed on the check. The fact that the Rices were paying the mortgage on the land also supports the court's finding that the Rices no longer had an interest in the check, but that the check was full payment for the property.

The court's conclusion that there was not sufficient evidence to prove a silent

partnership is supported by the record, as mentioned above. The court's conclusion that Rogers did not acquire or perfect a lien on the check also is proper. A lis pendens notice was filed by the Mullers' attorneys when the Tazewell County lawsuit was filed, and was among the documents before the court. While Rogers agrees that the notice did not create a lien, he maintains that the bank's lien is contingent on the determination of Mullers' and Rogers' interests in state court. Muller says the "lien or encumbrance" created by the lis pendens "should logically attach to the certified check..." but cites no authority for either the idea that the lis pendens creates a lien, or that it attaches to the check. We therefore agree with the bankruptcy court that Rogers failed to perfect or acquire a lien upon the check.[8]

As outlined above, the record contains

facts to support more than one permissible inference from the evidence submitted. The court's findings that the Mullers accepted the check, and that evidence was insufficient to show that Rogers owned any part of the check and its proceeds, or had a superior right to them over other creditors, have ample support in the record. Ergo, the bankruptcy court's findings cannot be overturned on appeal. We are satisfied that the court's conclusions of law should stand as well.

Due Process

A troublesome issue in this appeal is Rogers' claim that his due process right to a fair trial was violated by the bankruptcy judge's comments and conduct at both the August 20, 1984, hearing on motions and the final February 4, 1985, hearing.

Rogers cites in particular the following dialogue which took place at the motion

earing on August 20:

> THE COURT: I know Mr. Rogers. I've had Mr. Rogers in court before, and I don't believe anything he says.
>
> MR. KELLSTEDT (Rogers' attorney): That may be. I think that's a prejudgment that is improper and unnecessary.
>
> THE COURT: It's not a prejudgment. It's based on facts.

Further, he offers remarks made by the bankruptcy judge at the end of the February 4 hearing when the parties and the judge were discussing the type of order that should be entered.

> MR. KELLSTEDT: On behalf of Mr. Rogers, who has, as Mr. Muller testified today, an interest in the property and the proceeds in that check since 1976 --.
>
> THE COURT: He has no interest anymore because Mr. Radley's client got the money. You are out of order.
>
> MR. KELLSTEDT: We are not out of order. We are a party to this lawsuit.

THE COURT: I am not going to listen to you anymore.

MR. KELLSTEDT: You have not considered the case of the claim of Mr. Rogers at all in this case.

THE COURT: You didn't file a proper response.

MR. KELLSTEDT: I filed them. They are in the court records.

THE COURT: I am not going to argue with you.

MR. KELLSTEDT: I wish to call it to your attention that you never considered fairly and fully Mr. Rogers' --.

THE COURT: I am not going to hear anymore in this case.

Rogers argues that the judge's comments and conduct--which allowed him "no opportunity to argue further or present any proof,"[9] --violated his due process rights and was plain error under Fed. R. Civ. P. 61.

Rogers cites A.C. Newman, Jr. v. A.E. Staley Manufacturing Co., 648 F.2d 330, 333-35 (5th Cir. 1981), in support of his claim.

While that case is useful for the proposition that a reviewing court should consider the record as a whole rather than considering isolated remarks, the case is factually distinguishable from the one at bar in that it involves remarks of a district judge within the hearing of a jury.[10]

In Hamm v. Members of the Board of Regents of the State of Florida, 708 F.2d 647, 651 (11th Cir. 1983), the Court discussed general rules that apply to a situation where, as here, the appellant has not invoked either of two federal recusal statutes.[11] Usually, the bias must stem from extrajudicial sources, and must be focused against a particular party, although exceptions will be made where the judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party. Id. at 651 (citations

omitted). In Hamm, plaintiff based claims of bias and prejudgment on refusals to allow her attorney to respond to defense objections, a statement by the judge that he was not going to hear a lecture about the First Amendment, and interruptions in the plaintiff's case.

There, the Court ruled that while some of the judge's remarks seemed "intemperate and impatient, given the short duration of the proceedings, his actions do not evince pervasive bias. This is not a case in which the judge openly exhibited 'a partisan zeal' for the defendants or 'stepped down from the bench to assume the role of advocate' on the defendants' behalf." Id. at 651 (citations omitted).

Reviewing courts also recognize that a federal judge is not a "mere moderator" of proceedings, and has "broad powers to comment on the evidence...and [to] maintain the pace

of the trial by interrupting, or cutting off counsel as a matter of discretion." Coats & Clark, Inc. v. Gay, 755 F.2d 1506 (11th Cir. 1985), citing Moore v. U.S., 598 F.2d 439 (5th Cir. 1979).

Unquestionably, the right to a tribunal free from bias or prejudice is an essential element of due process. U.S. v. Scunto, 531 F.2d 842, 845 (7th Cir. 1976). It is also well settled that to establish a due process violation, the mere appearance of partiality or circumstances "which might lead one to speculate as to a judge's impartiality" is not enough. Instead, "a litigant is denied due process if he is in fact treated unfairly." Margoles v. Johns, 660 F.2d 291, 296 (7th Cir. 1981) (emphasis in original).

In Margoles, the Court noted that "serious facts" are required to warrant reversal on due process grounds. Quoting a

Fifth Circuit discussion of leading cases finding such violations, it said, "'They involved situations where there was actually some incentive to find one way or the other, i.e., financial considerations [citations omitted] or previous participation by the trying judge in the proceeding at which the contempt occurred [citation omitted].'" Id. at 297.

Bankruptcy Judge Lipkin's remarks during the motion hearing and his comments to, and treatment of, Mr. Rogers' attorney--and other attorneys--during the final February hearing were indeed regrettable and unworthy of praise. However, we do not think they reach the very high level of bias or notoriety required to constitute plain error or a denial of due process. Miley v. Delta Marine Drilling Co., 473 F.2d 856, 858 (5th Cir. 1973). First, we note that Mr. Rogers'

attorney took no action after the first hearing to seek recusal of the bankruptcy judge or to otherwise convey his concern about bias before the proceedings went further. At the February hearing, the judge may have gone too far in trying to hurry the proceeding along. The record reflects that after Mr. Jacobs testified, Mr. Church, attorney for the Rices, called Mr. Rice to the stand. The judge questioned Mr. Church about the need for further testimony, and Mr. Church agreed to excuse Rice.

> THE COURT: What else is there, gentlemen? I think under the evidence, Mr. Radley has a valid lien on this check. I want Mr. Radley to prepare an order to that effect.

A discussion about the terms of the order, and whether it would include a provision that the check constituted payment in full for the property, followed. After

several of the attorneys had spoken, Mr. Kellstedt spoke to commence the dialogue quoted previously in which he sought to present Rogers' interests. However, Kellstedt did not make an offer of proof or otherwise indicate he had testimony or evidence he wished to present. Appellee, in its brief, characterized Mr. Kellstedt's remarks as scolding the bankruptcy judge after he'd made his decision.

Again, although both hearings were conducted in a manner this Court in no way condones, we cannot say that Rogers was denied his due process right to a fair hearing.[12]

For these reasons, the decision of the bankruptcy court is AFFIRMED.

ENTER: March 30, 1987.

FOR THE COURT:

(S) Richard Mills
United States District Judge

END NOTES

[1] The back of the check read:

Total amount of sale	$240,000.00
Less Federal Land Bank Mortgage on the Fischer Farm	113,460.77
	$126,539.23

Will pay in full to Alvin S. Muller and Phyllis H. Muller.

[2] Both appellants also claim that the bankruptcy court improperly decided a case where a jury demand had been made. Appellee notes that although the Rices had demanded a jury, neither of the appellants had. However, since both Rogers and Muller participated in the February 4 hearing without objecting to proceeding without a jury, we think the parties waived any right to a jury trial. U.S. v. 1966 Beechcraft Aircraft Model King Air, 777 F.2d 947 (4th Cir. 1985). See also National Family Insurance Co. v. Exchange Nat'l Bank of Chicago, 474 F.2d 237, 241 (7th Cir.), cert. denied, 414 U.S. 825, 94 S.Ct. 129, 38 L.Ed.2d 59 (1973).

[3] Appellants claim notice of the hearing was inadequate. Rogers notes that the notice was marked on the "hearing" line, but not on the "trial" line. The notice stated the hearing would be on the bank's complaint. Rogers claims this was inadequate because it omits reference to his answer, affirmative defense and counterclaim. However, the bank's attorney suggested at the August 20 hearing on the motions that after all the motions were disposed of the next step would be to "set it down for trial and let the parties make a claim to this check come in and put on their evidence." No authority was cited for appellants' position; however generally, notice in a bankruptcy proceeding is adequate if it is reasonably calculated to achieve actual notice. See In re Wm. B. Wilson Mfg. Co., 59 B.R. 535, 538 (Bankr. W.D. Texas 1986). We think the notice given here

accomplished that purpose.

[4] David Radley, the bank's attorney, took possession of the check on December 9, 1983.

[5] 28 U.S.C. 157(b) states as follows:

> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to --
>
> (A) matters concerning the administration of the estate;
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
>
> (C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyance;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case until title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

This section was added to the Bankruptcy

Code as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted July 10, 1984, which took effect immediately and were to govern all bankruptcy cases then pending. We also note that a district court may classify a proceeding where the bankruptcy court has not already done so. Interconnect Telephone Services v. Farren, 59 B.R. 397, 401 n. 2 (S.D.N.Y. 1986). But see Rainey v. International Harvester Credit Corp., 59 B.R. 987 (N.D. Ill. 1986) (failure to ask bankruptcy judge to make the determination of whether the matter involved a non-core issue results in waiver of the issue on appeal).

[6] The Court's standard of review of a bankruptcy judge's decisions in core proceedings is also the clearly erroneous standard. Gaslight Club v. Official Creditors Committee, 46 B.R. 209, 211 (N.D. Ill. 1985).

[7] The bank officer testified and exhibits were introduced to show that the bank obtained a deficiency judgment in the amount of $231,642.64 against the Mullers in a foreclosure suit; that the bank obtained a citation to discover assets, and an order upon citation of the supplementary procedure, which created a judicial lien on Alvin Muller's interest in the certified check; that the judgment order was served on the Mullers by a private process server; and that a letter of transmittal was mailed from the bank's attorney to the Sheriff of Peoria County requesting the sheriff to serve a certified copy of the judgment order on the Mullers; and that the sheriff then served the order upon Phyllis Muller.

[8] In finding that Glen Rogers failed to acquire or perfect a lien on the check, the bankruptcy court went on to say that the lis

pendens notice failed to create a lien on the check because lis pendens notice only affects title to land, not personal property, under Ill. Rev. Stat. ch. 30, 121. While we agree that Rogers did not acquire a lien by filing a lis pendens notice, we note that Illinois courts have held that the doctrine of lis pendens is not confined to real estate, but also pertains to personal property except negotiable paper. See Stavros v. Karkomi, 39 Ill. App. 3d 113, 124, 349 N.E.2d 599 (1st Dist. 1976).

[9] Appellant's brief, p. 9.

[10] In Newman v. A.E. Staley Mfg. Co., 648 F.2d 330, 334 (5th Cir. 1981), the Court's concern was that the jury could have concluded that the district judge was biased in favor of the plaintiff. The Court said, "A district judge should always bear in mind that the influence of the trial judge on the

jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." Id. at 334, quoting Quercia v. United States, 239 U.S. 466, 470, 53 S.Ct. 698, 699, 77 L.Ed. 1321 (1933).

[11] 28 U.S.C. 144 provides for recusal when a party files a timely affidavit and motion alleging that the judge before whom the matter is pending is personally biased or prejudiced against him. 455 outlines the general rule that a judge disqualify himself in any proceeding where his impartiality might reasonably be questioned, and includes specific instances when he must do so. Hamm v. Members of the Board of Regents of the State of Florida, 708 F.2d 647, 651 (11th Cir. 1983). These recusal statutes may be invoked against bankruptcy judges. See In re Lorraine Johnson-Allen, 68 B.R. 812 (Bankr.

E.D. Pa. 1987).

In Hamm, since the appellant did not proceed under either statute, the Court applied the plain error standard of review.

[12] A similar case under recusal statutes involving a judge's comments during a proceeding is U.S. v. Antonelli, 582 F. Supp. 880 (N.D. Ill. 1984).

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE:	)	
	)	
ALVIN S. MULLER and PHYLLIS H. MULLER	)	Bankruptcy Case No. 184-01111
	)	
Debtors.	)	
	)	
THE FIRST NATIONAL BANK OF PEORIA, a national banking association,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adv. No. 184-0167
	)	
ALVIN S. MULLER, PHYLLIS H. MULLER, GLEN ROGERS, ROBERT E. RICE, MYRTLE R. RICE, CHARLES E. COVEY, TRUSTEE, and DANIEL E. HARROD,	)	
	)	
Defendants.	)	

FINAL JUDGMENT ORDER

On February 4, 1985 came for hearing the Complaint for Declaratory Judgment and Mandatory Injunction filed herein by plaintiff, THE FIRST NATIONAL BANK OF PEORIA, and all answers and affirmative defenses filed there-

to, and the court, finding jurisdiction over the parties hereto and the subject matter presented herein, and having heard evidence and arguments of the interested parties herein by way of a bench trial, the court first noted the following appearances:

A. Plaintiff, THE FIRST NATIONAL BANK OF PEORIA, was represented by its attorney, DAVID B. RADLEY.

B. ALVIN S. MULLER was represented by his attorneys, MICHAEL W. HELLER and RICHARD M. BURGESS.

C. Defendant, PHYLLIS H. MULLER, was represented by her attorney, GARY S. SCHWAB.

D. GLEN ROGERS was represented by his attorney, JAMES P. KELLSTEDT.

E. Defendants, ROBERT E. RICE and MYRTLE R. RICE, were represented by their attorney, GLENN J. CHURCH.

F. Defendant, CHARLES E. COVEY,

Trustee, was represented by his attorney, CARL REARDON.

G. Defendant, DANIEL M. HARROD, filed an answer and affirmative defense herein, but failed to appear in person or by counsel during the trial hereof.

FURTHER, the court, having considered the pleadings filed herein and evidence and arguments presented herein, DOTH FIND:

FINDINGS OF FACT

1. In 1977 ALVIN S. MULLER and PHYLLIS H. MULLER agreed to sell certain real estate to ROBERT E. RICE and MYRTLE R. RICE known as the Fischer Farm in Groveland Township, Tazewell County, Illinois.

2. In 1977 pursuant to said real estate sales agreement, ALVIN S. MULLER and PHYLLIS H. MULLER conveyed said real estate to ROBERT E. RICE and MYRTLE R. RICE by execution and delivery of a warranty deed and delivery of

possession of said real estate.

3. Subsequent thereto, ALVIN S. MULLER and PHYLLIS H. MULLER disagreed with ROBERT E. RICE and MYRTLE R. RICE as to the terms of said real estate sales agreement.

4. On or about November 16, 1979 ROBERT E. RICE and MYRTLE R. RICE obtained issuance of a certified check (plaintiff's Exhibit 1) drawn on The First National Bank in East Peoria, Illinois in the amount of $126,539.23 payable to ALVIN S. MULLER and PHYLLIS H. MULLER.

5. On or about November 16, 1979 ROBERT E. RICE and MYRTLE R. RICE delivered said check to ALVIN S. MULLER and PHYLLIS H. MULLER.

6. While ALVIN S. MULLER and PHYLLIS H. MULLER were in possession of said check, on August 1, 1982, ALVIN S. MULLER exercised control over said check when he signed a

promissory note purporting to give DANIEL M. HARROD and Norval D. Hodges an "attorney's lien" upon said check. A copy of said note was filed herein as Exhibit A attached to the answer and affirmative defense of defendant, DANIEL M. HARROD.

7. Defendant, ALVIN S. MULLER and PHYLLIS H. MULLER, voluntarily retained possession of said check until December 9, 1983 when, pursuant to an order of the Tenth Judicial Circuit of Illinois, Peoria County (plaintiff's Exhibit 6), ALVIN S. MULLER and PHYLLIS H. MULLER delivered said check to DAVID B. RADLEY, an attorney for plaintiff, THE FIRST NATIONAL BANK OF PEORIA.

8. By voluntarily holding exclusive possession of said check from November 16, 1979 to December 9, 1983, a period of over four years, and by attempting to grant a security interest in said check as aforesaid,

ALVIN S. MULLER and PHYLLIS H. MULLER, by their conduct, accepted said check by operation of law according to its tenor, and became the sole and exclusive owners of said check and the proceeds thereof.

9. Although ALVIN S. MULLER testified that he "considered" GLEN ROGERS to be his "partner" with regard to said real estate, and GLEN ROGERS had delivered a quit-claim deed to said real estate to ALVIN S. MULLER or his order, insufficient evidence was presented to prove GLEN ROGERS owned said check or any part of the proceeds thereof, prior or superior to the judgment liens of THE FIRST NATIONAL BANK OF PEORIA. No evidence was offered to prove GLEN ROGERS ever held legal or equitable title to said real estate, or any part thereof or interest therein, or had a superior right to the proceeds of sale thereof to the creditors of ALVIN S. MULLER

and PHYLLIS H. MULLER.

10. No evidence was offered to prove DANIEL M. HARROD or Norval D. Hodges, or their successors in interest, if any, ever obtained a valid and perfected attorney's lien upon said check.

11. ROBERT E. RICE and MYRTLE R. RICE have no interest in said check, having voluntarily conveyed and delivered said check to ALVIN S. MULLER and PHYLLIS H. MULLER in full consideration for said transfer of real estate as is recited on the face and reverse side of said check, and having received consideration therefor, the conveyance of said real estate.

12. At the time this bankruptcy proceeding was filed, said check was owned by the Debtors herein, ALVIN S. MULLER and PHYLLIS H. MULLER, and their interests therein passed to the duly-appointed trustee here-

in, CHARLES E. COVEY, subject only to the valid and perfected liens thereon as found and declared herein.

13. On January 27, 1983 in a case then pending in the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, entitled THE FIRST NATIONAL BANK OF PEORIA v. ALVIN S. MULLER and PHYLLIS H. MULLER, case number 82 CH 3991, a judgment was ordered and duly entered in favor of THE FIRST NATIONAL BANK OF PEORIA and against ALVIN S. MULLER and PHYLLIS H. MULLER in the amount of $231,643.64.

14. A copy of the Order Approving Report of Sale and for Deficiency Judgment ordering said judgment on January 21, 1983 was admitted into evidence herein as plaintiff's Exhibit 2.

15. In said Peoria County Case Number 82 CH 3991, the presiding judge authorized a

private process server to serve process therein, and a copy of said Order for Private Process Server was admitted into evidence herein as plaintiff's Exhibit 3.

16. In said Peoria County Case Number 82 CH 3991, a Citation to Discover Assets was issued on April 29, 1983 and properly served upon ALVIN S. MULLER and PHYLLIS H. MULLER on May 3, 1983 by said private process server. (plaintiff's Exhibit 4)

17. In said case number 82 CH 3991, on May 27, 1983 THE FIRST NATIONAL BANK OF PEORIA filed a Motion for an Order requiring ALVIN S. MULLER and PHYLLIS H. MULLER to endorse and deliver said check to THE FIRST NATIONAL BANK OF PEORIA in partial satisfaction of said judgment. (plaintiff's Exhibit 5)

18. In said case number 82 CH 3991, on December 9, 1983 the presiding judge of said

court declared said judgment in favor of THE FIRST NATIONAL BANK OF PEORIA and against defendants, ALVIN S. MULLER and PHYLLIS H. MULLER in the amount of $231,643.64, "... is made a lien upon Alvin S. Muller's interest in said certified check...". (plaintiff's Exhibit 6)

19. In said case number 82 CH 3991, a certified copy of said judgment order was served by said private process server upon ALVIN S. MULLER and PHYLLIS H. MULLER on July 5, 1983. (plaintiff's Exhibit 7)

20. In said case number 82 CH 3991, on or about December 12, 1983, a certified copy of said Order Approving Report of Sale and for Deficiency Judgment was delivered to the Sheriff of Peoria County, Illinois for service upon PHYLLIS H. MULLER pursuant to Ill. Rev.Stat., Ch. 110, Sections 12-110 and 12-111. (plaintiff's Exhibit 8)

21. Said certified copy of said judgment order was served by the Sheriff of Peoria County upon PHYLLIS MULLER on January 4, 1984. (plaintiff's Exhibit 9)

22. THE FIRST NATIONAL BANK OF PEORIA filed a timely claim herein based upon said judgment and liens created upon said check.

23. No part of said judgment has been satisfied.

CONCLUSIONS OF LAW

24. When this bankruptcy was commenced and at all times thereafter, THE FIRST NATIONAL BANK OF PEORIA has had a perfected judgment lien upon said check for the following reasons:

A. A citation for a supplementary proceeding was served upon ALVIN S. MULLER and PHYLLIS H. MULLER on May 3, 1983, pursuant to Ill.Rev.Stat., Ch. 110, Sec. 2-1402, which created a judgment lien upon said

check.

Bank of Broadway v. Goldblatt (1968) 103 Ill.App.2d 243.

Mid-West National Bank v. Metcoff (1974) 23 Ill.App. 3d 607.

Asher v. United States (7th Cir. 1978) 570 F.2d 682.

In re Marriage of Rochford (1980) 91 Ill.App.3d 769.

B. The Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, in case number 82 CH 3991 on December 9, 1983 ordered that said judgment be made a lien upon ALVIN S. MULLER'S interest in said certified check pursuant to Ill.Rev.Stat., Ch. 110, Sec. 2-1402.

C. A certified copy of said judgment order was served upon ALVIN MULLER and PHYLLIS H. MULLER on July 5, 1983 pursuant to Ill.Rev.Stat., Ch. 110, Sec. 12-111. Said service had the same legal effect as serving

a writ of execution had prior to September 23, 1983, when the Illinois legislature abolished writs of execution and provided a certified copy of judgment orders should be used in their stead. Ill.Rev.Stat., Ch. 110, Sec. 2-1501.

D. A certified copy of said judgment order was delivered to the Sheriff of Peoria County, Illinois on December 3, 1983 pursuant to Ill.Rev.Stat., Ch. 110, Sec. 12-111, and said certified copy of said judgment order was served upon PHYLLIS H. MULLER on January 4, 1984 pursuant to said statute. Delivery of said judgment order to the Sheriff of Peoria County made said judgment a lien upon the goods and chattels of PHYLLIS H. MULLER in Peoria County, Illinois, including said check.

Ill.Rev.Stat., Ch. 110, Sec. 12-111

Levine v. Pascol (1968) 94 Ill.App.2d

43.

Kaiser-Ducett Corp. v. Chicago-Joliet Livestock Mkt.Center, Inc. (1980) 86 Ill.App. 3d 216.

E. Said check has been in the possession of THE FIRST NATIONAL BANK OF PEORIA since December 9, 1983.

Ill.Rev. Stat., Ch. 26, Secs. 9-301, 9-305.

25. DANIEL M. HARROD failed to acquire or perfect an attorney's lien upon said check because the only method of creating and perfecting an attorney's lien in Illinois is prescribed by Ill.Rev.Stat., Ch. 13, Sec. 14. Said check was not money or property "recovered" for ALVIN S. MULLER and the notice of lien was not timely served.

26. GLEN ROGERS failed to acquire or perfect a lien upon said check. The Lis Pendens Notice allegedly recorded by GLEN ROGERS failed to create a lien upon said

check because a Lis Pendens Notice only affects title to land, not personal property, under Ill.Rev.Stat., Ch. 30, Sec. 121.

27. GLEN ROGERS' contention that he was a "silent partner" of ALVIN S. MULLER, having an interest in said certified check superior to the perfected judgment lien of THE FIRST NATIONAL BANK OF PEORIA was not proved by competent evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

A. THE FIRST NATIONAL BANK OF PEORIA holds a first and prior lien upon said certified check and the proceeds thereof in the amount of $231,643.64 plus interest at the rate of 9% per annum from the date of said judgment, January 27, 1983.

B. All other claims of liens upon or interest in said certified check are subordinated to said lien of THE FIRST NATIONAL

BANK OF PEORIA.

C. Defendants, ALVIN S. MULLER and PHYLLIS H. MULLER, are ordered to endorse said certified check over to THE FIRST NATIONAL BANK OF PEORIA within 14 days hereof.

D. All defendants herein are divested of title to said certified check and the proceeds thereof, and title is ordered vested in THE FIRST NATIONAL BANK OF PEORIA pursuant to Bankruptcy Rule 7070 and Federal Rules of Civil Procedure, Rule 70.

E. This order is intended to be a final appealable order, as there is no just reason to delay enforcement of or appeal from this order.

ENTER:

(S) Max J. Lipkin
Bankruptcy Judge

The Clerk is directed to send copies of this order to:

DAVID B. RADLEY
700 First National
Bank Bldg.
Peoria, IL 61602

MICHAEL W. HELLER
311 Main Street
Peoria, IL 61602

RICHARD M. BURGESS
3965 N. Brookside Dr.
Peoria, IL

GARY S. SCHWAB
600 Jefferson Bank
Bldg.
Peoria, IL 61602

JAMES P. KELLSTEDT
1225 Duryea
Peoria, IL

GLENN J. CHURCH
1000 Savings Center
Tower
Peoria, IL

CARL REARDON
444 E. Washington
East Peoria, IL

DANIEL HARROD
Eureka
Illinois

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 7, 1988

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

No. 87-1727

IN THE MATTER OF: ALVIN S. MULLER and PHYLLIS H. MULLER, Debtors APPEAL OF: GLEN ROGERS.	Appeal from the United States District Court for the Central District of Illinois, Springfield Division No. 86 C 3021 RICHARD MILLS, Judge

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED

AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, and costs on appeal are waived, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 13, 1988.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

No. 87-1727

IN THE MATTER OF:

ALVIN S. MULLER and
PHYLLIS H. MULLER,
Debtors.

FIRST NATIONAL BANK
OF PEORIA, National
Banking Association,
Plaintiff-Appellee,

vs.

ALVIN S. MULLER,
PHYLLIS H. MULLER,
GLEN ROGERS, ROBERT
E. RICE, MYRTLE R.
RICE, CHARLES C.
COVEY, Trustee, and
DANIEL M. HARROD,
Defendants-Appellants,

APPEAL OF:

Appeal from the United States District Court for the Central District of Illinois, Springfield Division.

No. 86 C 3021

Richard Mills,
Judge.

GLEN ROGERS,
Defendant.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause on August 16, 1988 by defendant-appellant Glen Rogers, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

FIRST NATIONAL BANK of PEORIA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 184-0167
	)	
ALVIN S. MULLER, PHYLLIS H. MULLER, GLEN ROGERS, ROBERT E. RICE, MYRTLE R. RICE, CHARLES E. COVEY, TRUSTEE, and DANIEL M. HARROD,	)	
	)	
Defendants.	)	

BEFORE:

HON. MAX J. LIPKIN,
Bankruptcy Judge

August 20, 1984
2:00 p.m.
Peoria, Illinois

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

DAVID RADLEY, Esq.,
700 First National
Bank Building
Peoria, Illinois 61602
on behalf of the
Plaintiff;

MICHAEL HELLER, Esq.,
311 Main Street
Peoria, Illinois 61602
on behalf of Alvin S.
Muller;

James Kellstedt, Esq.,
1225 Duryea
Peoria Heights, IL
on behalf of Glen
Rogers;

conclusion of the case of the Circuit Court of Tazewell County is absolutely essential as to whether there's any right to that check, and the First National Bank only has a right in the check if Mr. Muller has a right in the check, and Mr. Muller claims he does. Mr. Rogers and Mr. Muller were partners and our position is generally the same throughout all those cases.

THE COURT: I know Mr. Rogers. I've had Mr. Rogers in court before, and I don't believe anything he says.

MR. KELLSTEDT: That may be. I think that's a prejudgment that's improper and unnecessary.

THE COURT: It's not a prejudgment. It's based on facts.

MR. KELLSTEDT: With the esteemed Judge Lipkin, but we have two cases pending, Your

Honor, and these issues that have gone a long ways . . .

THE COURT: Mr. Radley, do you know what has to be done to get this straightened out?

MR. RADLEY: I would suggest after all the motions are disposed of we set it down for trial and let the parties that make a claim to this check come in and put on their evidence. That's the only way to get the entire matter disposed of in one proceeding, Your Honor.

MR. CHURCH: Judge, we filed an extensive motion in this case setting forth all the background.

THE COURT: I know you did, Mr. Church.

IN THE UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

THE FIRST NATIONAL BANK OF PEORIA	)	
	)	
Plaintiff,	)	
vs.	)	Adversary
	)	No.
ALVIN S. MULLER, PHYLLIS H. MULLER, GLEN ROGERS, ROBERT E. RICE, MYRTLE R. RICE, CHARLES COVEY, SR., and DANIEL W. HARROD.	)	184-0167
	)	
Defendants.	)	

The hearing commenced at 1:30 p.m. on February 4, 1985.

REPORT: The Honorable Max Lipkin.

APPEARANCES: ATTORNEY DAVID B. RADLEY, 700 First National Bank Building, Peoria, Illinois 61602, appeared on behalf of the Plaintiff.

ATTORNEY MICHAEL W. HELLER, Lawyers Building, 311 Main, Peoria, Illinois 61602, appeared on behalf of Alvin S. Muller.

ATTORNEY GARY S. SCHWAB, 600 Jefferson Bank Building, Peoria, Illinois 61602, appeared on behalf of Phyllis H. Muller.

ATTORNEY GLENN J. CHURCH, 1000 Savings Center Tower, Peoria, Illinois 61602, appeared on behalf of Robert E. Rice and Myrtle R. Rice.

ATTORNEY CARL F. REARDON, 422 East Washington Street, East Peoria, Illinois 61611, appeared on behalf of Charles Covey, Sr.

ATTORNEY DANIEL M. HARROD, Eureka Professional Building, Eureka, Illinois 61530, appeared pro se.

ATTORNEY JAMES P. KELLSTEDT, 1225 East Duryea Avenue, Peoria Heights, Illinois 61614, appeared on behalf of Glen Rogers.

REPORTER: Jane M. Collignon
Reporting Services
P.O. Box 1204
Rock Island, Illinois 61201

MR. KELLSTEDT: On behalf of Mr. Rogers who has, as Mr. Muller testified to today, an interest in the property and the proceeds and in that check since 1976 --

THE COURT: He has no interest anymore because Mr. Radley's client got the money. You are out of order.

MR. KELLSTEDT: We are not out of order. We are a party to this lawsuit.

THE COURT: I am not going to listen to you any more.

MR. KELLSTEDT: You have not considered the case of the claim of Mr. Rogers at all in this case.

THE COURT: You didn't file the proper response.

MR. KELLSTEDT: I filed them. They are in the court records.

THE COURT: I am not going to argue with you.

MR. KELLSTEDT: I wish to call it to your attention that you never considered fairly and fully Mr. Rogers' --

THE COURT: I am not going to hear any more in this case.

JOURNAL STAR, Peoria, Thursday,
November 29, 1984

LAWYERS DESCRIBE JUDGE'S COURTROOM AS 'SAD CIRCUS'

RICK BAKER

Lawyers sit in a row before the hearings begin and seem to practice gritting their teeth and grimacing to maintain their composure in the face of what is to come. It is perhaps the courtroom most dreaded by attorneys in the state of Illinois.

They will soon be insulted, barked at, asked if they are on drugs, and called incompetent, lazy shysters in front of their clients. This is the Peoria bench of United States Bankruptcy Judge Max Lipkin - a courtroom permeated by an atmosphere of "sheer misery and arrogance,' says a lawyer who frequently appears here.

Lipkin, a tiny, 76-year-old whose loud outbursts in court belie his size and age, presides over bankruptcy proceedings like some impatient, all-knowing father certain he is about to be profoundly disappointed in his children before him.

The hearings begin. A lawyer about twice the size of Lipkin timidly offers a client's schedule of bankruptcy payments, as if expecting to be swatted and sent off to bed.

Shortly after the lawyer begins to speak, the judge puts on a look of immense pain, as if he'd just had all four wisdom teeth yanked, and says: "You don't know what you're talking about."

"But your honor. . ." the attorney tries to explain.

The judge grows angry and loud,

"I said you don't know what you're talking about! YOU'VE BEEN HERE SEVERAL TIMES AND YOU STILL DON'T KNOW WHAT YOU'RE TALKING ABOUT!"

Business as usual in this courtroom. An attorney introduces himself by name and the judge barks: "I know who you are. You don't have to tell me who you are. I see you all the time." And one gets the distinct impression that if the lawyer had not introduced himself, the judge would have said something like: Who the hell are you?

"Max Lipkin has taken the phrase 'arbitrary and capricious' to new heights," a lawyer said. "There are attorneys in this town who won't even touch bankruptcy law because they figure life is too short to be appearing before Max."

Another lawyer said he once walked from a courtroom with a client after a dressing down by Lipkin and the client said: "You told me that guy was difficult. But you didn't tell me he was nuts."

Lipkin isn't nuts. He isn't senile. He isn't crooked. He isn't drunk. And he isn't dumb. He's a grouchy, rude, arrogant curmudgeon who seems fairly certain he is the lone bright spot in a world populated by idiots.

And Max Lipkin in a legal career garnished by sprinklings of brilliance, community concern and impudence, has always been that way.

When Lipkin was the Peoria city Attorney, he addressed city fathers as if they had the combined intelligence of a herd of cattle. At the time he was

considered the best municipal lawyer in the state and one of the best in the country.

Before his appointment to the bankruptcy bench in 1974 by U.S. District Judge Robert Morgan, Lipkin was considered a very capable federal prosecutor.

While Lipkin doesn't seem to be conducting business much different than usual on the bench, there's a growing concern about his conduct among attorneys.

The Journal Star confidentially interviewed more than a half dozen attorneys who appear frequently before Lipkin, and all but one said they felt the judge should retire.

When Lipkin was told that, he said, "Oh, isn't that nice of them"

When a reporter told Lipkin he

thought the judge was rude and arrogant, Lipkin said: "I am, I admit it. And so are you."

Lipkin explains his brash conduct on the bench as a lifelong inability to tolerate incompetence. "I have no patience with lawyers who don't do their homework or come unprepared."

A lot of Lipkin's allegations of incompetence appear empty, however. At times he appears incapable of tolerating humanity in general.

He's trying to explain away some of the best lawyers in their field by saying they're fools," an attorney said. "That simply isn't the case, I've seen him humiliate lawyers who've had as much if not more experience in the field as he has for no good reason."

But another longtime bankruptcy

attorney said: "I've had Max Lipkin read me out for coming to court unprepared. But I've never had him do it when he wasn't right. I think he's a good judge and brilliant man. I just wish I knew what his PROBLEM is."

Another lawyer who appears before Lipkin frequently described his courtroom as "a sad circus" where trials that should last a day last an hour. "If you question his conduct in hurrying things along, he insults you until you shut up and sit down. Attorneys and their clients leave that courtroom in a kind of shell shock."

Yet another attorney said that while he doesn't agree with Lipkin's hastening of proceedings, he doesn't think it hurts much. "I don't think he's a good judge. I've told him that and I wish he'd

retire. But he's got a way of cutting through the crap that I don't think affects the end results of a lot of cases. Granted, he doesn't do things the way Congress says they're supposed to be done. But I don't think Congress makes much difference to Max."

While Lipkin's ire is generally aimed at lawyers, it sometimes slops over to others in the courtroom. While examining the grocery budget of a man declaring bankruptcy, Lipkin asked: "What does he eat, steaks all the time...you better tell your wife to cut down on the expensive food."

When a woman declaring bankruptcy said her problems were partially a result of her boyfriend moving out and not paying his $300-a-month share of the bills, the judge said "Well, she'll get

another one to move in. Are you sure you won't, in the next three years, get any live-in friends?"

An attorney said: "That kind of attitude doesn't belong in any courtroom in this country. I don't care who the judge is, or what the excuse is, because there is no excuse for it."

One of Lipkin's insults (he called a lawyer a shyster) recently resulted in his being reported to the federal appeals court in Chicago for disciplinary action. The court heard the complaint and apparently decided to do nothing.

And the number of appeals of Lipkin's decisions by lawyers who claim he rules arbitrarily and without a basis in law, appear to be growing.

Still, he sits solidly on his bench, and claims he will not retire until his

term expires in October of 1986.

A lawyer said: "The reason nobody does anything about Max is because there's nothing you can do about him. He makes lawyers miserable to the best of his ability.

"One of these days, he's going to be legend. These young lawyers won't believe it could have been. And we'll all sit around the fireplace with our grandchildren and tell them tales of Judge Lipkin."

JOURNAL STAR, Peoria, Tuesday,
January 15, 1985

JUDGE MAX LIPKIN, 76, TO RETIRE
IN DECEMBER

United States Bankruptcy Judge Max J. Lipkin will retire in December, nearly a year before his term expires.

"I decided it's time to leave," Lipkin told the Journal Star today. His term doesn't expire until October, 1985.

Lipkin, 76, was appointed to the bench in 1974 by U.S. District Judge Robert Morgan.

A recent Journal Star story by Columnist Rick Baker told how some attorneys dread appearing in Lipkin's courtroom because of the verbal mistreatment by the judge.

An attorney who frequently appears before Lipkin was quoted as saying that the courtroom was permeated by an

atmosphere of "sheer misery and arrogance." Lipkin is a former city corporation counsel.

JOURNAL STAR, Peoria, Tuesday,
July 9, 1985

LIPKIN QUIT JUDGESHIP AFTER SUSPENSION

By Paul Gordon
of the Journal Star

Former U.S. Bankruptcy Judge Max G. Lipkin was suspended by the Judicial Council of the U.S. 7th Circuit Court of Appeals the day before he resigned his seat.

Collins Fitzpatrick, circuit executive of the Judicial Council, said Monday the suspension was due to allegations that Lipkin had health problems that interfered with his performance on the bench.

Lipkin resigned before the allegations could be thoroughly investigated, Fitzpatrick said.

He declined to comment on the nature of the health problems or who made the

allegations that Lipkin's health affected his rulings.

The order suspending Lipkin was entered June 27 by the Judicial Council, Fitzpatrick said. Lipkin, who had planned to retire at the end of the year anyway, submitted his resignation the next day, ending 11 years on the bench. The resignation took effect July 1.

Fitzpatrick said the suspension was a rarity. He said the allegations had been partially checked out and the Judicial Council felt the suspension was necessary to prevent potential problems until a thorough investigation could be completed.

"Usually, health problems (of judges) do not interfere with the job, so there aren't any general procedures to follow. (The Judicial Council) felt this

was the best course of action," Fitzpatrick said.

He said the suspension was to be temporary pending the completion of the investigation. . . .

. . .

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 27, 1985.

Before

Hon. WILLIAM J. BAUER, ACTING CHIEF JUDGE

Hon. _____

Hon. _____

O R D E R

IT IS ORDERED that United States Bankruptcy Judge Max J. Lipkin is here y temporarily relieved of his responsibilities as bankruptcy judge for health reasons, pending an investigation by the Court of Appeals of certain allegations that the Court has received.

88-1487

CASE NO. _____

Supreme Court, U.S.
FILED
JAN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1988

IN THE MATTER OF:

ALVIN A. MULLER and PHYLLIS H. MULLER,

Debtors.

THE FIRST NATIONAL BANK OF PEORIA, a National Banking Association,

Plaintiff-Appellee, Respondent,

v.

ALVIN S. MULLER, PHYLLIS H. MULLER, GLEN ROGERS, ROBERT E. RICE, MYRTLE E. RICE, CHARLES E. COVEY, Trustee, and DANIEL M. HARROD,

Defendants-Appellants.

Petition for Writ of Certiorari of GLEN ROGERS,

Defendant-Appellant, Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BAYMILLER, CHRISTISON & RADLEY
700 First National Bank Building
Peoria, Illinois 61602
Tel. (309) 674-8125
Attorneys for Respondent

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE..... 1

II. SUMMARY OF ARGUMENT..... 2

III. ARGUMENT..... 3

IV. CONCLUSION..... 5

TABLE OF AUTHORITIES

In re Muller, 851 F.2d 916, 918 (7th Cir. 1988)..... 4

Ohio Casualty Ins. Co v. Bazzi Constr. Co., 815 F.2d 1146, 1149 (7th Cir. 1987)..... 4

Walker v. Maccabees Mut. Life Ins. Co., 753 F.2d 599, 602 (7th Cir. 1985).. 4

I. STATEMENT OF THE CASE

This case was tried without a jury before the bankruptcy court in Peoria, Illinois. The issue before the court was whether a lien asserted by the plaintiff, THE FIRST NATIONAL BANK OF PEORIA, upon a certified check was valid and enforceable. Appellant Rogers claimed an interest in the check as a "silent partner" of the payee who was the debtor. At the conclusion of the trial, the court ordered judgment in favor of the plaintiff Bank and against all defendants.

ROGERS appealed to the district court arguing, among other things, that the bankruptcy judge's conduct of the trial deprived him of due process. Appellant claims his rights were violated upon two occasions, at a pretrial hearing and at the trial five months later. Appellant made no objection before the trial court.

On appeal the district court

affirmed, ruling that appellant had waived any objection to the trial judge's conduct by not raising the issue prior to appeal. On further appeal, appellant argued no waiver had occurred because the trial judge's conduct was "plain error." The Seventh Circuit Court of Appeals affirmed the district court and the bankruptcy court, ruling that the record does not show error of the nature or extent that would warrant application of the plain error doctrine.

II. SUMMARY OF ARGUMENT

This is not an appropriate case for certiorari under the guidelines of Supreme Court Rule 17. The decision of the Seventh Circuit Court of Appeals in this case is not in conflict with any other court and does not depart from the accepted and usual course of judicial procedure.

III. ARGUMENT

Supreme Court Rule 17 provides, in summary, that certiorari will only be granted when there are important reasons, including a conflict of the opinion appealed from with another federal court of appeals or a state court of last resort or if the opinion departs substantially from the usual course of judicial proceedings. In this case the closest appellant has come to asserting one of these grounds is appellant's argument that if the Seventh Circuit had refused to rule upon the basis of the plain error doctrine, such refusal would have been inconsistent with rulings in other circuits where the plain error doctrine has been utilized in civil cases. But the Seventh Circuit here did not rule upon the question of whether plain error may be asserted in a civil case. Only a passing reference to that question was made in

dicta, and then the court examined the facts and ruled there was insufficient plain error to reverse the trial court. The court said:

> Rogers also makes a series of challenges to the bankruptcy proceeding, but as Rogers admits, he failed to raise these issues in that court. He thus has waived any challenge. Ohio Casualty Ins. Co. v. Bazzi Constr. Co., 815 F.2d 1146, 1149 (7th Cir. 1987). Rogers concedes his waiver and asks only that we review the challenged issues under a plain error analysis. It is dubious whether this circuit recognizes plain error in a civil proceeding, such as the case here. If invocable at all, "[o]nly in most exceptional circumstances we will allow a civil appellant to make a nonjurisdictional argument for the first time on appeal... ." Walker v. Maccabees Mut. Life Ins. Co., 753 F.2d 599, 602 (7th Cir. 1985). We are not persuaded that this case represents an exceptional circumstance. In re Muller, 851 F.2d 916, 918 (7th Cir. 1988).

After expressing doubts as to whether plain error may be asserted in a civil action, the court determined the facts of

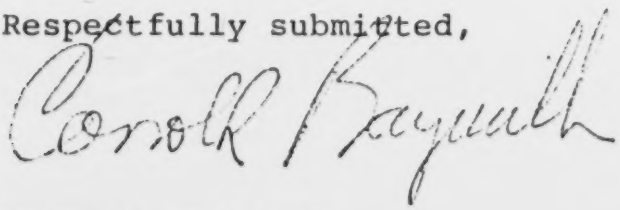
this case did not include such exceptional circumstances as to warrant invocation of the plain error doctrine.

In all other respects, the Seventh Circuit's opinion is also consistent with holdings of other courts and the accepted and usual course of judicial procedure.

IV. CONCLUSION

For the reasons stated, plaintiff-appellee, THE FIRST NATIONAL BANK OF PEORIA, requests denial of appellant's Petition for Writ of Certiorari.

Respectfully submitted,



CARROLL BAYMILLER
BAYMILLER, CHRISTISON & RADLEY
Attorneys for plaintiff-appellee
700 First National Bank Bldg.
Peoria, IL 61602
Tel. (309) 674-8125

DAVID B. RADLEY hereby certifies that pursuant to Supreme Court Rule 28, he arranged and did send by United States Mail, with first-class postage prepaid and properly addressed to the Clerk of this Court, U. S. Supreme Court, Washington DC, forty copies of a Respondent's Brief in Opposition to Petition for Writ of Certiorari on the 26th day of January, 1989.

At the same time and place, postage prepaid by regular mailing, three copies of the foregoing Brief were mailed to the following attorneys:

James P. Kellstedt
Attorney for appellant
1225 Duryea
Peoria, IL 61614

Glen Church
Attorney at Law
499 N. Columbia
Columbus, OH 43209

DAVID B. RADLEY

Subscribed and sworn to before me this 26th day of January, 1989.

Notary Public

"OFFICIAL SEAL"
NANCY K. FOOTE
Notary Public, State of Illinois
My Commission Expires 3-15-92